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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-423

PROVIDENT LIFE INSURANCE COMPANY, R. W. EDICK, ET AL., AS TRUSTEES OF THE PROVIDENT LIFE INSURANCE COMPANY VOTING TRUST DATED NOVEMBER 15, 1955, AND EXTENDED TO NOVEMBER 14, 1980,

Petitioners,

vs.

RESERVE LIFE INSURANCE COMPANY AND MIDLAND NATIONAL LIFE INSURANCE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioners,

vs.

RESERVE LIFE INSURANCE COMPANY AND MIDLAND NATIONAL LIFE INSURANCE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered June 21, 1974, as amended July 29, 1974.

OPINIONS BELOW

The Findings of Fact, Conclusions of Law, Order for Judgment and the Judgment of the United States District Court for the District of North Dakota, Southwestern Division, are unreported and are printed in Appendix A hereto, *infra*, pp. A1-A18. The Opinion of the Court of Appeals for the Eighth Circuit is reported at 499 F. 2d 715 and is printed in Appendix B hereto, *infra*, pp. A19-A38.

JURISDICTION

The Judgment of the Court of Appeals was entered on June 21, 1974 and amended July 29, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Petitions for rehearing were denied by Order entered on July 29, 1974. By Order entered on August 15, 1974, the Mandate of the Court of Appeals was stayed for thirty days pending the filing of this Petition for Certiorari. Further stay of mandate to October 14, 1974, was granted by Order entered September 10, 1974.

QUESTIONS PRESENTED

I.

Whether, in holding that Section 14(a) of the Securities Exchange Act of 1934 applied to *securities not registered* under that Act, in the face of the clear and unambiguous language of that section which applies only to *registered* securities, the Court below transcended said Act and lacked power to so adjudicate.

II.

Whether, in holding that Section 12(g) of the Securities Exchange Act of 1934 required the registration of Voting Trust Certificates of a Voting Trust involving solely the Common Stock of an insurance company and that the solicitation by the

Voting Trustees of the Voting Trust to extend the Trust violated Section 14(a) of the Act, the Court below usurped jurisdiction in bringing within said Act matters exempted therefrom by Section 12(g)(2)(G) of said Act.

III.

Whether, in holding that the solicitation of the extension of a Voting Trust Agreement involving the Common Stock of an insurance company by the Trustees of said Trust Agreement came within the purview of the Securities Exchange Act of 1934, the Court of Appeals transcended said Act and invaded rights reserved to the States, in violation of the Tenth Amendment to the Constitution of the United States.

IV.

Whether the solicitation by Voting Trustees of consents to the extension of the term of the Voting Trust, which has been held by the District Court and the Court of Appeals to constitute the offering of new securities in exchange for outstanding securities of the Trustees, also constituted the solicitation of a proxy, consent or authorization within the meaning of Section 14(a) of the Securities Exchange Act of 1934.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Tenth Amendment to the Constitution of the United States set forth in Appendix C, *infra* p. A39.

Section 3(a)(9) of the Securities Act of 1933, 48 Stat. 906, 15 U.S.C. § 77(c)(a)(9) set forth in Appendix C, *infra* p. A39.

Sections 12(g)(1) and 12(g)(2)(G) of the Securities Exchange Act of 1934, 78 Stat. 565-568, 15 U.S.C. § 78*l*(g)(1) and 78*l*(g)(2)(G) set forth in Appendix C, *infra* pp. A39, A41.

Sections 14(a), 48 Stat. 895, and 14(d)(1), 82 Stat. 455, 84 Stat. 1497, of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) and 78n(d)(1), set forth in Appendix C, *infra* pp. A41, A42.

STATEMENT

This action was instituted by the respondents, Reserve Life Insurance Company and its affiliate, Midland Life Insurance Company, as individual plaintiffs and not as representatives of any class of security holders, for the purpose of voiding a Voting Trust created in 1955 by stockholders of Provident Life Insurance Company, a North Dakota insurance corporation. The Voting Trust was to have terminated in 1970, but the term thereof was extended to November 14, 1980, by the consent of certain Voting Trust Certificate Holders.

Petitioners, who were named as defendants in the action, are Provident Life Insurance Company and the Voting Trustees of a Voting Trust which holds 42.44% of the outstanding Common Stock of the insurance company.

In this action, respondents contended (i) that the extension of the Voting Trust was not valid under North Dakota law, (ii) that the solicitation of consents to the Voting Trust was invalid because the extended Voting Trust Certificates were not registered under the Securities Act of 1933 (15 U.S.C. § 77a *et. seq.*), (iii) that such solicitation was invalid because such securities were not registered under various state "blue sky" laws, and (iv) that the solicitation of consents to the extension was invalid because the Voting Trust Certificates which were to expire by their terms in 1970 had not been registered under the Securities Exchange Act of 1934 (15 U.S.C. § 78a *et seq.*) and the solicitation was in violation of Section 14(a) of that Act and the proxy regulations adopted by the Securities and Exchange Commission thereunder.

Respondents were holders of both Common Stock of the insurance company and Voting Trust Certificates which expired

in 1970. As holders of Voting Trust Certificates they did not consent to an extension and solicited other Voting Trust Certificate holders to refuse to consent. In the action commenced by them, they sought relief in the form of a judgment declaring the consents to the extension of the Voting Trust to be void or voidable and that any holder thereof was entitled to receive the underlying Common Stock upon surrender thereof to the Voting Trustees.

After trial, the District Court found for petitioners and dismissed the complaint.

On appeal, the Court of Appeals affirmed the District Court on the issues involving the North Dakota Voting Trust law, the Securities Act of 1933 and the state "Blue Sky" laws, holding that the extension of the Voting Trust was valid under North Dakota law and that the solicitation of the extension by the Voting Trustees constituted the offering of a new security in exchange for an existing security to the Trustees' existing security holders within the meaning of the exemption from registration provided by Section 3(a)(9) of the Securities Act of 1933 and similar exemptions provided under applicable state "Blue Sky" laws. The Court of Appeals, however, reversed the District Court with respect to the applicability of the proxy regulations of the Securities and Exchange Commission adopted under Section 14(a) of the Securities Exchange Act of 1934 to the solicitation by the Trustees and remanded the case to the District Court for further proceedings and judgment in conformity with its opinion. In reversing the District Court with respect to the application of the provisions of the Securities Exchange Act of 1934 to the actions of the Voting Trustees, the Court of Appeals held that, notwithstanding the availability of the exemption from registration under the 1933 Act provided by Section 3(a)(9) thereof, and, notwithstanding that the expiring Voting Trust Certificates were not registered under the 1934 Act, the solicitation was also subject to the proxy regulations under Section 14(a) of the 1934 Act, which is

expressly applicable only to securities registered under that Act. The result of the holding of the Court of Appeals was to invalidate the extension of the Voting Trust Agreement and to make further proxy solicitation with respect to the extension of the Voting Trust subject to the jurisdiction of the District Court and subject to the Commission's proxy regulations.

The evidence in this case is undisputed. In 1955 the Voting Trustees formed a Voting Trust, registered their Voting Trust Certificates with the Securities and Exchange Commission under the Securities Act of 1933, and solicited deposits with them under the Trust Agreement of Common Stock of Provident Life Insurance Company. The purpose of the Trust was to stabilize operations of the insurance company and avoid stock manipulations and raids upon the Company. 63.42% of the outstanding stock of the insurance company was deposited in the Trust which by its terms was to expire on November 15, 1970, unless extended.

On July 1, 1964, the Securities Exchange Act of 1934 was amended by the addition thereto of Section 12(g), (15 U.S.C. § 78*l*(g)). Section 12(g)(1) required that every issuer engaged in interstate commerce or in a business affecting such commerce or whose securities are traded by use of the mails or means of interstate commerce having total assets exceeding $1,000,000 and a class of equity securities held of record by 750 or more persons shall register such securities under that Act. Registration was required within 120 days after the last day of the issuer's first fiscal year after July 1, 1964, on which its total assets and number of such security holders exceeded the designated amounts. Section 12(g)(2)(G), however, provided that the provisions of Section 12 shall not apply in respect of any security issued by an insurance company if all of the following conditions are met:

> (i) such insurance company is required to and does file an annual statement with the Commissioner of Insurance of its domiciliary state substantially conform-

ing to that prescribed by the National Association of Securities Commissioners;

(ii) such insurance company is subject to regulation by its domiciliary state of proxies, consents or authorizations in respect of securities issued by such company in conformance with regulations prescribed by the National Association of Securities Commissioners;

(iii) after July 1, 1966, the purchase and sale of securities issued by such insurance company by beneficial owners, directors or officers of such company are subject to regulation (including reporting) by its domiciliary state substantially in the manner provided in Section 16 of said Act.

The conditions specified in Section 12(g)(2)(G) for an exemption of insurance company securities from registration under the Act were satisfied by the statutes of North Dakota, the domiciliary state of Provident Life Insurance Company, and by the regulations of its Commissioner of Insurance and the District Court so found (R. 74)[1] (App. A, *infra* A12, A16).

The Voting Trustees, having no assets and no fiscal year, did not register their outstanding Voting Trust Certificates under the 1934 Act.

During the latter part of 1969 respondents, who had acquired substantial amounts of Common Stock of Provident Life Insurance Company and Voting Trust Certificates representing such securities in the open market, approached management of the insurance company for the purpose of discussing affiliation with it. The proposed affiliation was rejected and the Voting Trustees determined to extend the Voting Trust for a ten-year period to November 14, 1980, in order to thwart a take-over threat by respondents which was then evident.

1. References to "R" or "R II" are to the two volume printed Appendix filed as the record with the Court of Appeals in accordance with Rule 30, Federal Rules of Appellate Procedure. The Clerk of the Court of Appeals has been requested to certify said Appendix and copy of docket entries to this Court as the Record.

Commencing on December 2, 1969, the Voting Trustees undertook solicitation of consents by Voting Trust Certificate Holders to the extension of the Voting Trust, relying upon the exemption from registration under the 1933 Act provided by Section 3(a)(9) thereof.

The solicitation was made by means of a detailed prospectus (R. II,10). Shortly after the commencement of the solicitation Provident Life Insurance Company received a letter dated December 30, 1969 from the Denver Regional Office of the Securities and Exchange Commission, stating that it had received information that the Voting Trustees were soliciting extension of the term of the Trust, pointing out the registration requirements of the 1933 Act and requesting advice as to whether the Voting Trustees intended to claim an exemption from such registration requirements (R. II, 81). Counsel for the Voting Trustees responded to the Commission's letter under date of January 12, 1970, supplying a copy of the prospectus being used by the Voting Trustees and advising that the Trustees were relying on the exemption from registration under the 1933 Act provided by Section 3(a)(9) thereof (R. II, 83). The Denver Regional Office did not reply to counsel's letter. On October 20, 1970, an attorney for the Commission informally advised counsel for respondents, who was requesting the Commission to take steps to stop the solicitation by the Voting Trustees, that it was the present view of the Commission's staff that an expiring voting trust can be extended by the Voting Trustees under the provisions of Section 3(a)(9) of the 1933 Act if the solicitation was limited to existing certificate holders (R. II, 50). The Court of Appeals in its opinion noted these facts, not as binding upon the Commission, but as evidencing the reasonableness of petitioners' reliance upon the exemption under the circumstances (App. B *infra* p. A29).

Prior to the commencement of the solicitation the Voting Trustees had filed with the Commissioner of Insurance of North Dakota copies of the prospectus and other soliciting material,

including financial statements of the insurance company. The Commissioner of Insurance concluded that the proxy regulations of his office did not apply to the solicitation of the extension of the Voting Trust for the reason that it was actually the offering of a new security, but that, in any event, the materials filed were in compliance with such proxy regulations (R. 75).

The solicitation of the Voting Trustees resulted in an extension of the Voting Trust to November 14, 1980, with respect to 42.44% of the outstanding shares of Common Stock of the insurance company. Respondents, who were holders of Voting Trust Certificates, did not consent to the extension and, upon surrender of their certificates in June of 1972, they received in exchange therefor the underlying Common Stock of the insurance company to which they were entitled.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals creates serious interpretative problems concerning the Securities Act of 1933 and the Securities Exchange Act of 1934 which we believe should be settled by this Court. We submit that the Court of Appeals has erroneously construed provisions of the Securities Exchange Act of 1934 which require compliance with the proxy regulations of the Securities and Exchange Commission by companies having securities registered under the Act and provisions of the Act exempting from registration thereunder securities of insurance companies domiciled in states having regulations meeting the standards set forth in the exemptive provision.

The decision of the Court, if allowed to stand, will seriously affect the activities of corporations, including insurance companies, having securities not registered under the Securities Exchange Act of 1934 in matters relating to corporate suffrage, insider trading and financial reporting and may result in unwitting civil and criminal liabilities not contemplated by Congress in the enactment of both statutes and the amendments thereto.

This case involves complex questions about the power of the federal government to regulate the activities of insurance companies and of persons engaged in the business of insurance, in the light of the history of such regulation and the specific exemption relating thereto, expressed in Section 12(g)(2)(G) of the Securities Exchange Act of 1934 and the reserved powers of the States under the Tenth Amendment.

It also involves the power of a court to bring *unregistered* securities within the proxy provisions of Section 14(a) of the Securities Exchange Act of 1934 although the section plainly states that it applies only to *registered* securities. It also involves the question of whether a transaction, lawful under the Securities Act of 1933, can be at the same time unlawful under the Securities Exchange Act of 1934.

The case involves important public questions, not only touching the administration of the said 1933 and 1934 Acts, but also reaching constitutional dimensions in the light of the powers reserved to the States under the Tenth Amendment.

The Court has ignored the clear, unambiguous language of the Securities Exchange Act of 1934 in holding that the mere requirement to register securities under the 1934 Act resulted in an obligation to comply with Section 14(a) of that Act even though the securities had not been registered under that Act. The decision is in direct conflict with the decision of the Court of Appeals for the Second Circuit in *Republic Technology Fund, Inc.* v. *Lionel Corp.*, 483 F.2d 540, 545 (C.A. 2, 1973) and of the District Court of New Jersey in *Bound Brook Water Co.* v. *Jaffe*, 284 F.Supp. 702, 705 (D.N.J. 1968).

The Court also transcended its power under the Securities Exchange Act of 1934 in holding that the solicitation to extend the terms of the voting trust was not exempt by the provisions of Section 12(g)(2)(G), which exempted matters "in respect of . . . any security issued by an insurance company" which met the three conditions mentioned in that section. The un-

disputed record is that those conditions were met. The Court recognized that this was a solicitation "in respect of the Provident Life stock" (App. B *infra* p. A34). At that point, the exemption became operative, and no language of the 1934 Act relating to proxies (assuming this was a proxy) could bring back into the 1934 Act a solicitation exempt by the provisions of that Act.

Under the rationale of the Court's judgment, proxies, periodic reporting and insider trading in respect of insurance companies' securities would come within the federal domain, notwithstanding the exemption in respect of securities issued by state regulated insurance companies under Section 12(g)(2)(G), adopted in 1964, and the legislative history of the 1970 amendments to Sections 13(d) and 14(d), which brought tenders and invitations to tender in respect of insurance company securities within federal regulations, and which specifically stated (H. Rep. No. 91-1655, 91st Cong., 2d Sess. 3 (1970)):

> "The bill does not seek to disturb the decision reached in 1964 to leave *periodic reporting, proxy solicitation* and *regulation of insider trading* with respect to securities of insurance companies to the appropriate State authorities." (Italics ours.)

In holding that voting trustees holding solely common stock of a state regulated insurance company were subject to the proxy regulations under Section 14(a) of the Securities Exchange Act of 1934 in solicitations to extend the voting trust, the Court has usurped jurisdiction reserved to the States under the Tenth Amendment.

The Court also has distorted the Securities Act of 1933 and the Securities Exchange Act of 1934 in holding that the same transaction constituted both the offer and sale of a new security within the meaning of the 1933 Act and the solicitation of a proxy within the meaning of the 1934 Act. By so holding, the Court has created a statutory inconsistency, the result of which

was that the same transaction was legal under the 1933 Act but illegal under the 1934 Act. This statutory inconsistency should be settled by this Court.

The Court has violated the Tenth Amendment to the Constitution of the United States. It has read words into a statute not there in a case involving a business impressed with the public interest, namely, insurance, thereby assuming jurisdiction over a subject matter not possessed by it. It has issued a decision directly contrary to another Court of Appeals and a District Court, and has created a legislative antithesis, namely, that a transaction may be lawful under one securities Act and at the same time unlawful under another such Act. The effect of the decision is to read Section 3(a)(9) out of the 1933 Act, although the 1933 and 1934 Acts are to be read in *pari materia.*

ARGUMENT

I.

The Court Below Exceeded Its Statutory Power in Holding That Section 14(a) of the Securities Exchange Act of 1934 Applied to Unregistered Securities When Said Section by Its Plain, Unambiguous Language Applies Only to Registered Securities. Its Decision Is In Clear Conflict with That of the Court of Appeals for the Second Circuit.

The Court below held that Petitioners' solicitation for the extension of the term of the voting trust involving solely Provident Life Insurance Company common stock violated the terms of Section 14(a) of the Securities Exchange Act of 1934 (15 U.S.C. § 78n(a)) and the proxy regulations of the Securities and Exchange Commission issued pursuant thereto. At the time of the solicitation, the Provident common stock and the expiring voting trust certificates representing said stock were not registered under Section 12 of said 1934 Act.

The Court below held that petitioners' reliance on an exemption from registration in respect of securities issued by an insurance company under Section 12(g)(2)(G) of said Act was misplaced and concluded that the " . . . *obligation to register* under § 12 brings into play the provisions of § 14(a) of the 1934 Act. . . . " (Italics ours.) (App. B, *infra,* A33). In so holding, the Court below ignored the plain words of Section 14(a) and transcended the statutory basis of its jurisdiction.

Section 14(a) provides in relevant part:

> "It shall be unlawful for any person . . . in contravention of such rules and regulations as the Commission may prescribe . . . to solicit . . . any proxy or consent or authorization in respect of any security (other than an exempted security) *registered pursuant to section 12 of this title.*" (Italics ours.)

A literal reading of this section indicates that its terms apply solely to securities *registered pursuant to section 12*. It has *no* application to unregistered securities which are *required to be registered*. The words are couched in clear, unambiguous language and are to be applied as written. *Reliance Electric Company* v. *Emerson Electric Company*, 404 U.S. 418, 427 (1972); *Blau* v. *Lehman Brothers*, 368 U.S. 403, 410-413 (1962).

The words prescribe the jurisdictional confines of Section 14 and *a fortiori* are to be strictly construed and carefully guarded against expansion by judicial interpretation. *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 17, 18 (1950). The Court below expansively rewrote these unambiguous words to read "registered or required to be registered pursuant to section 12" and in so doing, usurped jurisdiction over the subject matter.

The decision is directly in conflict with a decision of the Second Circuit and one of the District Court of New Jersey, both of which held that the words "registered pursuant to section 12" mean just what they say. In *Republic Technology Fund, Inc.* v. *Lionel Corp.*, 483 F.2d 540 (C.A. 2, 1973), *cert. denied* 39 L.ed 2d 472 (1974), plaintiffs claimed that certain proxy materials issued in connection with a merger were misleading and in violation of Section 14(a) of the 1934 Act. Judge Oakes stated, regarding the applicability of Section 14(a) (p. 545):

> "We commence by agreeing with the district judge in respect to his treatment of the claim under Securities Exchange Act § 14 and Rule 14a-9. The claimed violation of the proxy rules must fail because proxies were not solicited 'in respect of any security . . . *registered pursuant to section 12*' of the Act. Securities Exchange Act of 1934, § 14(a), 15 U.S.C. § 78n(a); SEC Rule 14a-2, 17 C.F.R. § 240.14a-2. See 5 L. Loss, Securities Regulation 2835-36 (1969)." (Italics ours.)

Bound Brook Water Company v. *Jaffe*, 284 F.Supp. 702 (D.N.J. 1968) reached the same result. Plaintiffs charged proxy

violations under Section 14(a). Judge Wortendyke stated (284 F.Supp. at 705):

> "It is nowhere alleged in the complaint before the Court that the securities which are the subject of this litigation are registered pursuant to 15 U.S.C. § 78*l* so as to fall within the jurisdictional confines of Section 14."

In a subsequent opinion, Judge Wortendyke dismissed the amended complaint stating, "An uncontroverted affidavit filed on behalf of the defendants on May 4, 1968 indicates that the stock is not so registered. Therefore, Section 14 of the Act is inapplicable to this case." *Bound Brook Water Company* v. *Jaffe*, CCH Fed. Sec. L. Reptr. ¶ 92,243 at pp. 97,141-97,142 (D.C.N.J. 1968).

In a closely analogous case, *Upson* v. *Otis*, 155 F.2d 606 (C.A. 2, 1946), the Second Circuit held that Section 17(a) of the Investment Company Act, which applies to "registered" investment companies, did not apply to a company not registered under the Act even though the Securities and Exchange Commission had charged the company in an unrelated action with unlawfully failing to register. Judge Frank stated in no uncertain terms (155 F.2d at 610):

> "As Automatic had not registered under the Investment Company Act at the time of the occurrence of the transactions covered by the complaint, § 17(a) of that Act has no bearing here."

These decisions understood the word "registered" to mean just that. There is no room for the judicial inclusion of the term "required to be registered." The legislative history of Section 12(g) of the 1934 Act also makes this clear.

The Securities and Exchange Commission's April 19, 1963 draft of a Bill to amend Section 12 by adding Section 12(g) submitted to the Industry Liaison Committee provided in part (Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce, on H.R. 6789, H.R. 6793, S. 1642, 88th Cong., 1st Sess., 658 (1963)):

> "(3) The provisions of section 13, section 14, section 16 and subsection (c) of section 20 of this title shall apply as if any security of a class registered *or required to be registered* pursuant to this subsection were a security registered pursuant to subsection (b) of this section." (Italics ours.)

This provision was deleted in the final draft submitted by the Commission and introduced as H.R. 6789 and H.R. 6793, 88th Cong., 1st Sess.

S. 1168, 85th Cong., 1st Sess., similarly proposed that Section 12(g) contain a provision to read as follows:

> "The provisions of sections 14 and 16 of this title shall apply as if any security registered *or required to be registered* pursuant to this subsection were a security registered pursuant to subsection (b)." (Italics ours.)

Earlier proposed bills would have expressly provided that Sections 13, 14 and 16 applied to securities required to be registered under Section 12, whether registered or not. See S. 2408, 81st Cong., 1st Sess; S. 1860, 82nd Cong., 1st Sess.; and S. 2054, 84th Cong., 1st Sess. Congress was cognizant of these provisions when considering the 1964 Amendments of the 1934 Act. Hearings before a Subcommittee of Senate Committee on Banking and Currency on S. 1642, 88th Cong., 1st Sess., 461-468 (1963).

The inclusion of provisions expressly providing that Section 14 governed securities required to be registered under Section 12, whether registered or not, clearly indicates that the drafters recognized that Section 14 as written applied only to securities in fact registered. The deletion of such a provision indicates quite clearly that both the drafters and Congress intended to delimit the application of Section 14(a) to securities which were in fact registered pursuant to Section 12.[2]

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2. When Congress chose to apply the terms of a section to securities required to be registered, it used that term. See Sections 12(h), 13(d)(1), and 14(d)(1) of the 1934 Act (15 U.S.C. 78*l* (h), 78m(d)(1), 78n(d)(1)).

In 5 Loss *Securities Regulation*, 2718 (2d Ed. 1969), the author states:

> "Do §§ 13, 14 and 16 apply when a class of security should be registered under § 12(g) but has not been? A negative answer is suggested not only by a literal reading of those three sections, which apply only to 'registered' securities, but also by the legislative history."

It is clear that Section 14(a) only reaches those securities registered under Section 12. The securities here were *not registered* under Section 12. Simply stated, the Court below transcended the statute and thus exceeded its power. As Mr. Chief Justice Waite said in *East Tenn., Va. and Ga. R. Co.* v. *Southern Telegraph Co.*, 112 U.S. 306 (1884) on p. 310:

> "The remedy is statutory only, and every court which takes jurisdiction for its enforcement is limited in its powers by the statute under which alone it can act."

See also *District of Columbia* v. *Carter*, 409 U.S. 418, 432-33 (1973); *Calhoun* v. *Harvey*, 379 U.S. 134, 138 (1964). This Court should not permit the securities laws to be extended by judicial fiat to an area where their coverage was carefully excluded.[3]

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3. The application of Section 14(a) to only registered securities sets an effective timing device. It is clear to whom it applies and to whom it has no application. It further protects issuers who in good faith fail to register under Section 12 from being caught in a maze of violations of Sections 13, 14 and 16. It also serves as an effective guidepost for "outsiders" to determine if they must comply with Sections 14 and 16 in regard to certain securities.

II.

The Court Below Usurped Jurisdiction in Bringing Within the Securities Exchange Act of 1934 Matters in Respect of Insurance Company Securities Exempted Therefrom by Section 12(g)(2)(G) of Said Act

At the time of the solicitation to extend the term of the voting trust, the expiring voting trust certificates were not registered pursuant to Section 12(g) of the 1934 Act.[4] The Court below held, however, that the certificates should have been registered based on its determination that the certificates were not exempt from registration under Section 12(g)(2)(G) and that the mere requirement to register brought the provisions of Section 14 into play (App. B *infra* p. A33). This decision emasculates the exemption from registration granted in respect of insurance company securities under Section 12(g)(2)(G). It brings matters within the provisions of Sections 12 and 14 which are specifically excluded.

Section 12(g)(2) provides in part:

> "The provisions of this subsection shall *not apply in respect of* . . .
> (G) *any security issued by an insurance company* . . .", (Italics ours).

provided certain conditions mentioned in said statute with respect to regulation by the domiciliary state were met, one of them being with respect to "proxies, consents or authorizations in respect of securities issued by such company", (*ante*, pp. 5-6). These conditions were satisfied by the statutes of North Dakota, the domiciliary state, and by the regulations of its Commissioner of Insurance, and the District Court so found. (*ante*, p. 6; R. 74, 115, 116.)

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4. The certificates were registered under the 1933 Act. The solicitation to extend the term of the trust was exempt from registration under the 1933 Act under Section 3(a)(9) of that Act and the Court below so held (App. B *infra* pp. A26-30).

The matter here fits squarely into this exemption. The underlying expiring voting trust certificates represented nothing more than insurance company securities. The voting trust certificates and the voting trust itself solely involved corporate suffrage of an insurance company—specifically a matter to be regulated by the states and placed beyond the reach of Section 12. (Section 12(g)(2)(G)(ii))

The Court below stated that ". . . the voting trust certificates which were extended may be viewed as *securities issued by Provident*, a life insurance company." (App. B *infra* p. A33) (Italics ours.) It recognized that the solicitation to extend the term of the voting trust was ". . . *in respect of* the Provident Life stock. . . ." (App. B *infra* p. A34) (Italics Court's.)[5] Quite clearly, this matter was "in respect of . . . any security issued by an insurance company" and is therefore exempt. Any other holding contorts the plain meaning of these words.

". . . (T)he touchstone should always be substance rather than form—whether it operates to include or to exclude." 1 Loss, Securities Regulation 462. (2d ed. 1969.) The matter here, whatever the characterization, involved nothing more than insurance company securities and the voting of those securities. It is specifically exempt from the coverage of Section 12(g). The matter cannot be brought back within the purview of that section by a pedantic process of construction.

The legislative history of this exemption establishes conclusively that Congress intended to leave with the States exclusive jurisdiction over insurance companies in designated areas—including that of corporate suffrage and proxy solicitations. H. Rep. No. 1418, 88th Cong., 2d Sess., 10 (1964) stated with respect to the extensive testimony of State insurance commissioners:

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5. The words "in respect of" mean clearly that, or they are mere surplusage. Cf. *Central Transfer Co.* v. *Terminal R. Assn. of St. Louis*, 61 F.2d 546, 548 (C.A. 8, 1932); *Chicago Title & Trust Co.* v. *U.S.*, 45 F.Supp. 323, 326 (N.D. Ill. 1941).

> "The thrust of the testimony by these representatives of the State insurance commissioners was that they be given an opportunity to demonstrate their ability *effectively to protect the investors* as well as the policyholders. The committee amendment gives these State commissioners this opportunity so to do." (Italics ours.)

See Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H.R. 6789, H.R. 6793, S. 1642, 88th Cong., 1st Sess., pp. 868-923 (1964); Cong. Record Vol. 109, p. 13,727 (1963); Cong. Record Vol. 110, pp. 17,917, 17922, 17924, 18180, 18383 (1964).

Congress reaffirmed this exemption in enacting the 1970 Amendments to the 1934 Act which brought within its purview tender offers for "any equity security" of an insurance company recognizing that such transactions were otherwise exempt under Sections 12, 13, 14 and 16 of the 1934 Act. H. Rep. No. 91-1655, 91st Cong., 2d Sess., 3 (1970) made it clear:

> "First, the bill extends the provisions of sections 13(d) and 14(d) of the Securities Exchange Act to acquisitions of and tender offers for securities of insurance companies. *The bill does not seek to disturb the decision reached in 1964 to leave periodic reporting, proxy solicitation and regulation of insider trading with respect to securities of insurance companies to the appropriate State authorities.*" (Italics ours.)

Thus, while Congress expressed grave concern about acquisitions and tender offers of insurance company securities, it specifically reaffirmed its earlier decision to leave proxy solicitations with respect to securities of insurance companies within the exclusive jurisdiction of the States. If Congress intended to regulate any aspect of corporate suffrage of insurance companies—*i.e.* voting trusts—it could have added language to do so. The matter, however, was carefully left exempt. See also H. Rep. No. 91-1655, 91st Cong., 2d Sess. 8-9 (1970); S. Rep. No. 91-1125, 91st Cong., 2d Sess., 2 (1970); hearings before the

Subcommittee on Securities of the Senate Committee on Banking & Currency, 91st Cong., 1st Sess., 16 (1969); Hearing before the Subcommittee on Commerce and Finance of the House Committee on Interstate & Foreign Commerce on H.R. 4285, S. 3431, S. 336, 91st Cong., 2d Sess., 5, 18, 67 (1970); Cong. Record Vol. 116, pp. 40188, 29252, 29253 (1970).

It is evident that Congress intended to exempt from the registration requirements of Section 12 all matters in respect of insurance company securities; the exemption is broad. There is no room to narrowly construe it. Indeed, the very language of Section 12(g)(2)(G) is framed in as broad terms as possible to carry out this purpose, "(t)he provisions of this subsection shall not apply *in respect of* . . . any security issued by an insurance company. . . .". The voting trust certificates here, representing nothing more than insurance company securities, fall easily within the letter of the exemption and are clearly within its legislative purpose.

Securities exempt under Section 12(g)(2)(G) are not subject to Section 14(a). Cf. *Sawyer* v. *Pioneer Mill Co., Ltd.*, 190 F.Supp. 21, 23 (D. Hawaii, 1960). The Court below has thus usurped jurisdiction over the subject matter under Section 12 and therefore Section 14 and ruled in an area specificaliy withdrawn by Congress from federal jurisdiction and left exclusively to the States. The judgment should not be allowed to stand. (*ante*, p. 17.)

III.

The Court Below Invaded Rights Reserved to the States and Thus Violated the Tenth Amendment by Holding That the Solicitation of the Extension of a Voting Trust Agreement Involving the Common Stock of an Insurance Company by the Trustees of Said Trust Agreement Came Within the Securities Exchange Act of 1934

The Court below wrote the law to decide this case. The Court rewrote Section 14 of the 1934 Act so that it would apply to "unregistered" securities as well as "registered" securities. (*ante*

pp. 13-17.) The Court further rewrote Section 12(g) of the 1934 Act and deleted Section 12(g)(2)(G) which granted an exemption from registration in respect of insurance company securities. (*ante* pp. 18-21.) In so doing, the Court brought within the ambit of the 1934 Act a matter not within it, but one specifically reserved to the States.

This Court recently examined the nature of the powers reserved to the States under the Tenth Amendment in *Goldstein* v. *California*, 412 U.S. 546 (1973). There the Court rejected Petitioner's argument that the State acted beyond its powers in enacting a criminal statute proscribing tape piracy. Mr. Chief Justice Burger, quoting Alexander Hamilton in Number 32 of the Federalist, stated at pp. 552-553:

> "An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the (Constitutional) convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*."

The three instances mentioned present no barrier here to the States' regulatory power in the area of corporate affairs and in particular the area of corporate suffrage of an insurance company. The Federal Government is not given exclusive power over corporate affairs; the States are not *expressly* prohibited from exercising such power, and the exercise of such power by the States is not totally *contradictory* and *repugnant* to any similar authority granted the Federal Government. Quite clearly

this is a matter reserved to the States by the Constitution. See also, *Ferguson* v. *Skrupa*, 372 U.S. 726, 730-731 (1963); *Lehnhausen* v. *Lake Shore Auto Parts*, 410 U.S. 356, 359-360 (1973).

In *Illinois Central Railroad Company* v. *Public Utilities Comm.*, 245 U.S. 493, 510 (1917), this Court said:

> "In construing Federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested." (citing cases.)

Here, rather than manifesting a clear intent to supersede or suspend the exercise of the reserved power of a state, Congress has specifically left this matter to the States. The Voting Trust Certificates here represented nothing more than insurance company securities. The Voting Trust Certificates and the Voting Trust solely involved corporate suffrage of an insurance company. The matter squarely fits within the letter of the exemption from registration under Section 12(g) of the 1934 Act ". . . in respect of . . . any security issued by an insurance company . . .". The legislative history of this exemption establishes conclusively that Congress intended to leave with the States exclusive jurisdiction over insurance company securities in designated areas—including that of corporate suffrage and proxy solicitations. (*ante* pp. 19-20.)

The Court below, in holding that Section 14(a) applied to "unregistered" securities as well as "registered" securities, and in further holding that the Voting Trust Certificates were required to be registered pursuant to Section 12(g) and that the requirement to register triggered the proxy provisions of Section 14(a), brought a matter within those sections which was specifically excluded and which was specifically reserved to the States. The law of this matter has its source solely in state

law, under which the transaction was proper in all respects. The Court below substituted its own formulation of substantive law.

This Court outlawed the practice of federal courts fashioning substantive legislation in disregard of the reserved power of a State in *Erie Railroad Company* v. *Tompkins*, 304 U.S. 64 (1937). Overruling *Swift* v. *Tyson*, 16 Pet. 1 (1842) on constitutional grounds, Mr. Justice Brandeis stated:

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State. . . . (p. 78)
>
> * * * * *
>
> "We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States." (p. 80)

Erie thus teaches that federal courts may not make substantive law so as to supersede or suspend the exercise of the reserved powers of a State. Nor can the practice be saved by a theory that Congress could have legislated in that area.

The Tenth Amendment stating "but a truism that all is retained which has not been surrendered" (*Sperry* v. *Florida*, 373 U.S. 379, 403) (1963), we respectfully submit that the Court below clearly invaded an area reserved to the States and under the mantle of the Tenth Amendment.

IV.

The Court Below Has Created a Statutory Inconsistency Which Has Not Been But Should Be Settled by This Court in Holding That the Same Transaction Constituted Both an Offering and Sale of a New Security Within the Meaning of the 1933 Act and at the Same Time the Solicitation of a Proxy, Consent or Authorization Within the Meaning of Section 14(a) of the 1934 Act. The Effect Is That a Transaction Lawful Under the 1933 Act Is Unlawful Under the 1934 Act.

The Court below reached the anomolous conclusion that the same transaction constituted both the offering and sale of a new security within the meaning of the 1933 Act and also the solicitation of a proxy, consent or authorization within the meaning of Section 14(a) of the 1934 Act. To reach this result, the decision adopts contradictory characterizations of the same transaction. It completely ignores and distorts the fundamental framework of the 1933 and 1934 Acts.

Petitioners, Trustees of the Voting Trust, solicited holders of expiring voting trust certificates to extend the term of the trust agreement from November 15, 1970, to November 14, 1980. The expiring trust certificates were registered under the 1933 Act. The provisions of the trust agreement provided for extensions of its term. Those who agreed to extend the term of the trust, had their expiring trust certificates stamped to reflect the extended term or else received new certificates.

The Court below properly held that this transaction constituted an offering for sale of a new security, namely, the amended or new voting trust certificates which reflected the extended term of the trust. The Court held that ". . . a single continuing trust existed and that the issuer-trust exchanged securities with its existing security holders." (App. B *infra,*

p. A30.) The registration requirements of the 1933 Act accordingly governed the transaction. Section 3(a)(9) of the 1933 Act however, exempts from registration:

> "(a)ny security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange . . . ."

The Court below held that the transaction here qualified in all respects under the Section 3(a)(9) exemption and that the offering therefore need not have been registered.[6] (App. B *infra*, p. 30.)

But the Court said that the "extension of the Provident voting trust constituted a *continuation of the initial security*. . . ." (App. B. *infra*, p. A34), that the voting trustees solicited a proxy of certificate holders to participate in the extended term of the trust, and that the transaction constituted a solicitation of a proxy within the meaning of Section 14(a) of the 1934 Act. (App. B *infra*, p. A34.)

This holding that the extension of the term of the trust constituted *"a continuation of the initial security* . . ." flatly contradicts the Court's earlier conclusion that ". . . a single continuing trust existed and that the issuer-trust *exchanged securities* with its existing security holders." Of its very essence, an existing security cannot be *continued* and at the same *exchanged* for a new security. The expiring voting trust certificates were not continued *in fact*. Registered under the 1933 Act, the voting trust certificates were exchanged as a matter of fact and law for new securities, and such *exchange* was exempt from registration by Section 3(a)(9) of the 1933 Act as the Court below held. By pure metaphysics (App. B *infra*, p. A34), the Court below has entangled the transaction in two entirely different

6. The exemption from registration applies to transactions " . . . where there is no practical need for (the bill's) application or where the public benefits are too remote." H. Rep. No. 85, 73rd Cong., 1st Sess., 5 (1933).

statutes geared to entirely different transactions, when it fits into but one.

Congress has recognized that Section 14(a) does not apply to offers to sell or to purchase securities. It required an amendment to Section 14 to extend its provisions to tender offers for securities. In amending Section 14 in 1968, by adding provisions to regulate tender offers, namely Sections 14(d), (e) and (f) (15 U.S.C. § 78n(d), (e) and (f)), Congress specifically recognized that ". . . when a cash tender offer is made, no information need be filed or disclosed to shareholders . . . The cash tender offer is similar to a proxy contest, and the committee could find no reason to continue the present gap in the Federal securities laws which leaves the cash tender offer exempt from disclosure provisions." (H. Rep. No. 1711, 90th Cong., 2d Sess., 3 (1968)). Congress thus specifically recognized that Section 14(a) does not apply to the purchase and sale of securities.

The Court properly held that the transaction here was an *exchange of securities*, namely, the exchange of the expiring voting trust certificates for the amended or new voting trust certificates. The Court specifically held that this transaction was an *offer* and *sale* in holding that the transaction was governed by the registration provisions of the 1933 Act, but that the securities were exempt from registration under Section 3(a)(9) of that Act. (App. B *infra* p. A26).[7]

This transaction having been properly characterized as an offer and sale of a new security governed by Section 5 of the 1933 Act, it cannot then also be made subject to Section 14(a) of the 1934 Act which does not even apply to an offer and sale. Thus the decision creates a statutory inconsistency, the result of which is that Section 14(a) of the 1934 Act makes a trans-

7. The exchange constituted an offer and sale of securities within the meaning of the 1933 Act. *United States* v. *Wernes*, 157 F.2d 797, 799 (C. A. 7, 1946); Cf. *Securities and Exchange Commission* v. *National Securities, Inc.*, 393 U.S. 453, 467 (1969).

action illegal which Section 3(a)(9) of the 1933 Act specifically has made legal.

The 1933 and 1934 Acts must be read together as parts of a single statutory scheme. "The two Acts are *in pari materia* and should be construed together as one body of law." *Axelrod & Co.* v. *Kordich, Victor & Neufeld,* 451 F.2d 838, 842 (C.A. 2, 1971); See 5 Loss, *Securities Regulation,* p. 3915 (2d ed. 1969). A reading of the 1933 and 1934 Acts in *pari materia* mandates the conclusion that one transaction cannot constitute both an offering for sale of new securities within the meaning of the 1933 Act and also the solicitation of a proxy within the meaning of the 1934 Act. Such reading further mandates the conclusion that Section 14(a) of the 1934 Act cannot make a transaction unlawful which Section 3(a)(9) of the 1933 Act has specifically made lawful. Any other conclusion completely shatters the framework of the 1933 and 1934 Acts and reads Section 3(a)(9) out of the 1933 Act. The decision of the Court below does exactly that and should not be allowed to stand.

CONCLUSION

For the reasons stated herein, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Note: Service hereof is being made upon the Securities and Exchange Commission, which filed a memorandum *amicus curiae* in the Court below.

APPENDIX A

UNITED STATES DISTRICT COURT
District of North Dakota
Southwestern Division

RESERVE LIFE INSURANCE COMPANY, and MIDLAND NATIONAL LIFE INSURANCE COMPANY, *Plaintiffs,* *vs.* PROVIDENT LIFE INSURANCE COMPANY, R. W. EDICK, JOHN E. DAVIS, CECIL R. FULLER, MILTON RUE, JR., JOHN A. ZUGER, JOHN A. ROUZIE and T. W. SETTE, as Trustees of the Provident Life Insurance Company Voting Trust Dated November 15, 1955 and Extended to November 14, 1980 and Dakota National Bank, *Defendants.*	Civil No. 1040

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

The above entitled matter came on for trial before the Honorable Ronald N. Davies, Senior Judge, United States District Court, upon the Amended and Supplemental Complaint of the plaintiffs, and the Amended Answer of the defendants; the plaintiffs appeared by their attorneys, Richard P. Rausch and Alan L. Austin, and the defendants appeared by their attorneys, John A. Zuger, Sr., Leonard H. Bucklin and Robert J. Sugrue,

at the courtroom in the United States Courthouse in the City of Bismarck, North Dakota, on November 14, 1972, at 10:00 A.M., and the parties having offered their evidence and having submitted their briefs and the Court being fully advised in the premises, does now make and find the following Findings of Fact, to-wit:

FINDINGS OF FACT

1.

The plaintiff, Reserve Life Insurance Company, is a Texas corporation, carrying on a life and health insurance business in the State of North Dakota and other states; that the plaintiff, Midland National Life Insurance Company, is a South Dakota corporation carrying on a life and health insurance business in North Dakota and other states; Sammons Enterprises, Inc., a foreign corporation, controls 99% of the plaintiff, Reserve Life Insurance Company, and directly or indirectly controls 8 or 10 other life and health insurance companies; that Reserve Life Insurance Company has 99% control of the plaintiff, Midland National Life Insurance Company.

2.

Provident Life Insurance Company is a North Dakota corporation carrying on a life and health insurance business in the State of North Dakota and in the same states in which the plaintiffs and their associated companies also carry on business; that Sammons Enterprises, acting through its officer, Rose, together with its controlled companies, Reserve Life Insurance Company and Midland National Life Insurance Company, determined to and did begin a continuing plan to take over and control Provident Life Insurance Company, its business competitor; that corporate resolutions were adopted authorizing William Rigsbee, President of Midland Life and T. A. Rose of Sammons Enter-

prises, to obtain stockholder and voting trust certificate holder lists for use in a tender offer for controlling stock of Provident Life Insurance Company; that the plaintiffs and the defendants are in competition in the selling of life and health insurance in the same territories and are also in direct competition in the recruiting of personnel to carry on said business.

3.

The plaintiffs proposed to defendant, Provident Life Insurance Company, that it affiliate with their insurance organizations and when such proposal was declined by Provident Life Insurance Company, the plaintiffs brought lawsuits against the defendants in the State Courts of North Dakota and Minnesota, and this action to secure names, addresses and shareholdings of common stockholders, and Voting Trust Certificate holders under Provident Life Insurance Company Voting Trust, and to void such Trust.

4.

That the instant suit is brought by the plaintiffs representing only themselves and is not as a class action, not joined in by other stockholders, and not participated in by either state or federal securities officials.

5.

That the plaintiffs do not seek recission or damages in connection with stock or Voting Trust Certificates purchased by them, but only seek to void the Voting Trust formed by other stockholders of Provident Life Insurance Company so that they may purchase such shares with the voting rights thereof free of the provisions of the Voting Trust.

6.

Approximately 67% of the shareholders of Provident Life Insurance Company, to stabilize its operations and prevent raids

and take-overs, entered into a Voting Trust Agreement for a period beginning November 15, 1955 for a period of 15 years, to terminate on November 15, 1970, unless extended by agreement of the parties thereto, which Voting Trust Agreement is plaintiffs' exhibit 4 in evidence herein.

7.

That said Voting Trust was formed under and in full compliance with the laws of North Dakota, and was a valid Voting Trust under said laws; that the stockholders who joined the Trust, transferred their stock of record to seven Voting Trustees and the voting rights thereto, and received Voting Trust Certificates entitling them to all cash dividends, and to a return of their common stock on November 15, 1970, unless they agreed to extend the Trust.

8.

That the Voting Trust Certificates, as originally issued, were registered with the Securities and Exchange Commission under the Securities Act of 1933.

9.

Section 13 of the Voting Trust Agreement specifically provided that its duration could be extended by agreement of those parties to it who agreed to an extension and that those holders of Voting Trust Certificates who did not agree to an extension would be entitled to a return of their common stock placed under the Trust on November 15, 1970.

10.

The plaintiffs herein refused to agree to extend the duration of the Voting Trust, as to all Voting Trust Certificates which it had purchased from other holders, and after the Trust was extended by others did surrender their Voting Trust Certificates, and did demand and did receive common stock in exchange

therefor, up to trial, and were entitled to receive common stock of their subsidiary, American Security Life Insurance Company, on surrender of Voting Trust Certificates which they had not surrendered or demanded be exchanged back to common stock.

11.

On or about December 2, 1969, the Voting Trustees began a solicitation of existing members of the Voting Trust to agree to an extension of the Voting Trust, and Exhibit 28 is the written solicitation materials sent to the existing members of the Voting Trust. Approximately two-thirds of the existing Voting Trust Certificate holders who constituted 42% of all of the shareholders of Provident Life Insurance Company, agreed to extend the duration of the Voting Trust and they signed written consents agreeing to extend the term of the Voting Trust to November 14, 1980, which extension by the terms of the written consents was to become effective and operative November 15, 1970.

12.

The solicitation of the extension of the Voting Trust was limited to the existing Voting Trust Certificate holders on its effective date and was further limited to those states in which an exemption was available under the Securities or Blue Sky Laws of each state, providing exemption from registration for offerings by an issuer to its existing security holders and under the Federal Securities Act of 1933 which exempts from registration any security exchanged by the issuer with its existing security holders exclusively where no commission or remuneration is paid for soliciting such exchange.

13.

The Voting Trustees paid no commission or payments to anyone for any solicitation of consents to extend the Voting Trust.

14.

The Voting Trustees under the Voting Trust Agreement formed effective November 15, 1955, and to terminate November 15, 1970, unless extended, and the Trustees under the Trust as extended to November 14, 1980, by those Voting Trust Certificate holders who agreed thereto are the same "issuer", and the extension of the term of the Voting Trust was and is a new security of the same issuer.

15.

In connection with the solicitation, a full, adequate, and true disclosure of all material facts was made to the Voting Trust Certificate holders whose consent to an extension of the Trust was sought, which solicitation materials are defendants' exhibit 28 and included a letter, a nine month report of Provident Life Insurance Company, a Prospectus, a consent form and a return envelope; the solicitation materials used have been presented to the North Dakota and South Dakota Securities Commissions, the North Dakota Insurance Commissioner, and the Federal Securities and Exchange Commission; solicitation was made in 37 states which provided an exemption from registration.

16.

In soliciting consents to the extension of the Voting Trust, the Voting Trustees were requesting the beneficial owners of common stock of Provident Life Insurance Company which had been deposited under the Voting Trust Agreement to give up their Voting rights with respect to such stock for an additional ten years. The solicitation accordingly was in respect of the common stock of Provident Life Insurance Company.

17.

Prior to November 15, 1970, the Voting Trustees filed with Provident Life Insurance Company, the counterparts of the Con-

sents to the extension of the duration of the Voting Trust, plaintiffs' exhibit 5, signed by the Voting Trust Certificate holders who agreed to extend the duration of the Trust and further filed the counterpart of the extended Voting Trust Agreement itself, which by its terms was to become effective November 15, 1970, and to terminate November 14, 1980, plaintiffs' exhibits 1 and 3. The Voting Trustees had at the time of the formation of the Voting Trust in 1955, filed counterparts of the Voting Trust Agreement and its execution thereof by those shareholders joining in the Voting Trust which began on November 15, 1955.

18.

That the Voting Trustees' filing as set out in Finding of Fact No. 16, was made pursuant to Section 10-19-35 NDCC and was in full compliance with said statute governing the filing of Voting Trusts formed by shareholders of a corporation, both as to time of filing and as to required documents to be filed.

19.

The Trustees, prior to soliciting Consents to extension of the Voting Trust, obtained the opinion of securities counsel, defendants' exhibit 23, as to the exemption of the solicitation under federal securities laws and state securities laws and obtained specific rulings as to the exemption of the securities from registration in North Dakota, defendants' exhibit 19; in South Dakota, defendants' exhibit 20; in Minnesota, defendants' exhibit 22; in Florida, defendants' exhibit 21.

20.

The Voting Trustees attached to the Consent form mailed to Voting Trust Certificate holders, temporary mailing labels, for verification and checking of addresses of Voting Trust Certificate holders which were removed upon their return and after checking the address, and that such consent forms were un-

affected thereby and that all such Consent forms filed have the true and valid signature of the consenting Voting Trust Certificate holder whose name appeared thereon.

21.

That North Dakota adopted the Model Business Corporation Act prepared by the Committee on Corporate Laws of the American Bar Association, but modified Section 34 of the Model Act dealing with Voting Trusts, which became Section 10-19-35 NDCC, by not adopting the provision of the Model Act which required Voting Trustees to keep a record of Voting Trust Certificate holders, their names, addresses, and number of shares, and to deposit a copy of such record with the corporation, and North Dakota has no such requirement; that the North Dakota Act only requires a deposit with the corporation of a counterpart of the Voting Trust Agreement; that both North Dakota law and the Voting Trust Agreement formed by Provident Life Insurance Company shareholders, provide for only an inspection of a counterpart of the Voting Trust Agreement as deposited with the corporation, and provides that such inspection can be made by a shareholder and a Voting Trust Certificate holder.

22.

That after a holder of Voting Trust Certificates had executed his consent to extend the duration of the Voting Trust to November 14, 1980, he was invited to send in his Voting Trust Certificates to be stamped with information or legend indicating that the shares were subject to the Voting Trust for the extended period to November 14, 1980, or that new certificates would be issued when he sent his Voting Trust Certificate to the transfer agent of the Voting Trustees for re-issue or transfer.

23.

That all consents to extension of the duration of the Voting Trust were revocable at any time prior to November 15, 1970,

when the extended duration of the Voting Trust was to become effective. Any Voting Trust Certificate holder who revoked his consent prior to November 15, 1970, was entitled to surrender his Voting Trust Certificate and have a return of his common stock.

24.

That all Voting Trust Certificate holders who did not consent to an extension of the duration of the Voting Trust were entitled to receive back their common stock and that the plaintiffs to this suit have received back the common stock represented by their Voting Trust Certificates which expired November 15, 1970.

25.

That North Dakota has no statute law limiting or restricting the right of a person to agree to the extension of the duration of a Voting Trust of which he is a member or a Voting Trust Certificate holder, and no statute limiting or restricting the time when an agreement or consent to extension must be executed; that in the absence of such statutory provision the common law of North Dakota permitted extension of a Voting Trust by agreement of the parties thereto provided the right to vote their shares was not transferred by the holder thereof to Trustees for a period of not to exceed ten years; that the written executed Consents to extension of the Provident Life Insurance Company Voting Trust prior to November 15, 1970, to become effective on November 15, 1970, complied with North Dakota law; that shares of stock which had been transferred of record into the names of the Voting Trustees, can under North Dakota law be continued in their names of record by consent of the holder of a Voting Trust Certificate for the period of the extended Trust without the necessity of a re-transfer from the Trustees to the Voting Trust Certificate holder, and by him in turn back to the Voting Trustees.

26.

Plaintiffs have surrendered in exchange for common stock, all Voting Trust Certificates purchased by them expiring November 15, 1970, and as to which they would not agree to an extension of the duration of the Trust to November 14, 1980; All Voting Trust Certificates expiring November 14, 1980 held by them, they have purchased from Voting Trust Certificate holders who did agree to and did execute written consents to extension of the Trust.

27.

That the plaintiffs continuing their plan to obtain control of Provident, communicated with Provident's shareholders in an effort to oppose and attempt to disuade persons from agreeing to an extension of the Voting Trust; that as a result of such contacts and solicitations, revocations of consents to extension of the Trust were sent to the Voting Trustees; that continuing the plan to take control of Provident Life Insurance Company, the plaintiffs contacted a broker claiming that the Voting Trust was void and the Voting Trust Certificates were illegal and void; and that at the time of such communication to the brokers, the plaintiffs had no judicial determination and no determination by any securities officials of such alleged invalidity but their own expressed opinion. That plaintiffs made no attempt to comply with Section 14(a) of the Securities and Exchange Act of 1934 in connection with their solicitation of shareholders and others in opposition to the Voting Trustees proposal for an extension.

28.

That plaintiffs mailed a general letter to Provident common shareholders, some of whom were also Voting Trust Certificate holders, opposing extension of the Voting Trust, defendants' exhibit 11, which the North Dakota Insurance Commissioner found to be misleading, deceptive, and containing incorrect facts.

29.

That Voting Trust Certificates and common shares of Provident Life Insurance Company have traded at the same price at all times in the market place without any differential, and the market action of both has followed the ups and downs of life insurance stocks.

30.

That plaintiffs have made complaints to both state and federal securities officials and have attempted to have them take official action against the Voting Trust to declare it void and that such officials, both state and federal, have taken no action.

31.

That plaintiffs have as shareholders and Voting Trust Certificate holders, not participated in any meetings of shareholders, nor have they at any time opposed the exercise of Voting rights of common stock by the Voting Trustees. They have further accepted dividends paid on the stock or certificates held by them; that the plaintiffs have never objected to any action taken by the Voting Trustees or the directors or officers of Provident Life Insurance Company; that due to complaints filed by the plaintiffs with the Federal Securities and Exchange Commission, the Commission inquired as to the alleged exemption from registration of the extension of the duration of the Voting Trust and that the attorney for the Voting Trustees replied thereto setting forth the basis of the exemption and that there has been no further inquiry, request for information or act of any kind by the Securities Exchange Commission.

32.

That the Voting Trustees have filed annual reports with the Securities Exchange Commission each year from 1956 up to and through 1971.

33.

The Voting Trustees have no assets; have no fiscal year, and have no beneficial interest in the shares held by them as Trustees; and the Voting Trustees engage in no financial transactions, relating thereto.

34.

The Securities and Exchange Commission staff has taken the position that the solicitation of consents to the extension of the Voting Trust, being limited to existing Certificate holders, was exempt under Section 3(a)(9) of the Federal Securities Act of 1933. The Securities and Exchange Commission has refused to join in the instant litigation or take a position with the plaintiffs.

35.

The North Dakota Insurance Commissioner has adopted regulations concerning the solicitation of proxies requiring the filing of annual financial statements as required by the National Association of Insurance Commissioners and there has been enacted in the State of North Dakota, laws requiring the reporting of security transactions by insiders and imposing liabilities on them. Such regulations and laws meet the conditions prescribed by Section 12(g)(2)(G) of the Securities Exchange Act of 1934.

36.

That in the formation of the original Voting Trust, the persons joining said Trust transferred their shares of record to the Voting Trustees; that the By-Laws of Provident Life Insurance Company provide that the corporation shall recognize and deal with the recordholders and not the beneficial holders of its stock.

37.

That those Voting Trust Certificate holders who consented to an extension of the duration of the Voting Trust, agreed that the

Voting Trustees would continue to be the holders of record of the common shares of stock represented by said Voting Trust Certificates. The plaintiffs did not agree to an extension of the duration of the Voting Trust and refused to sign consents to extend the duration. All of the Voting Trust Certificates that they hold expiring November 14, 1980, were purchased by them from other persons who did execute written consents to extension of the duration of the Voting Trust.

38.

The solicitation of the extension of the Voting Trust was made in 37 states. That the Securities and Exchange Commission staff has been fully aware of the unregistered solicitation of consents to extension of the term of the Voting Trust and after being advised by plaintiffs' counsel of the details of the solicitation have acquiesced in the Commission's counsel's opinion by taking no enforcement action against the defendants.

From the foregoing Findings of Fact, the Court now makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1.

That the Provident Life Insurance Company Voting Trust was formed November 15, 1955 by approximately 67% of its shareholders to terminate November 15, 1970, unless further extended, and was validly formed under the laws of North Dakota and became effective on said date.

2.

That said Trust provided by its terms that its duration could be extended by agreement of those parties to it who would consent thereto, and that it was extended as a valid trust to November 14, 1980, by two-thirds of its existing Voting Trust Certificate holders.

3.

That the extended Trust complies with all North Dakota laws as to its extension, and the formalities of its execution and filings.

4.

That the Voting Trustees have complied with all North Dakota laws regarding inspection of the Voting Trust Agreements.

5.

That plaintiffs have no standing to sue under the Federal Securities Act of 1933, since they are not "purchasers" of the security in question (the extended Voting Trust Certificates) were not in privity with the Voting Trustees and did not consent to the proposed extension, and that no civil enforcement by a private party is authorized by said Act.

6.

That the solicitation of consents to the extension of the Voting Trust was exempt from registration under the Federal Securities Act of 1933 under Section 3(a)(9) thereof which provides an exemption for:

> "Any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange."

since the Voting Trustees are the "issuer" of Voting Trust Certificates, the extension of the term of a Voting Trust constituted a new security of the same issuer and the original Trust instrument provided for a renewal thereof and no commission or other remuneration was paid in connection with the solicitation of the extension, and the solicitation was limited to existing security holders of the Trustees. Payment of expenses by the Voting Trustees in connection with the solicitation did not constitute "commissions or other remuneration" for soliciting the exchange within the meaning of Section 3(a)(9).

7.

That plaintiffs have no standing to sue under state securities or blue sky laws since they are not "purchasers" of any of the original Voting Trust Certificates or of any extended Voting Trust Certificates, and such state laws have no provision authorizing civil enforcement of the registration provisions thereof by a party not in privity of contract with the issuer, nor is a sale of securities in violation thereof void but only voidable at the election of a purchaser.

8.

That the solicitation of consents to extension of the Voting Trust was exempt from registration under applicable blue sky laws which provided an exemption from registration for offerings by an issuer to its existing security holders in exchange for outstanding securities or otherwise conditioned upon non-payment of any remuneration for procuring or soliciting the exchange and laws which provided an exemption for the issuance of securities in exchange for other securities of the same issuer pursuant to a right of conversion. That the right to consent to an extension of the term of the Trust was a right of conversion.

9.

That the solicitation of Consents to extension of the Voting Trust was exempt from registration in the remaining states in which solicitation was made under specific provisions of exemption, and that the solicitation herein complied with such statutory provisions.

10.

The defendant trustees in soliciting an extension of the term of the Voting Trust, were offering a new security because of the resulting change in the terms of the existing Voting Trust Certificates, which solicitation did not constitute a solicitation of a proxy, consent or authorization within the meaning of Section 14(a) of the Securities Exchange Act of 1934.

11.

Registration of Voting Trust Certificates was not required under Section 12(g) of the Securities Exchange Act of 1934 because the Voting Trustees as the "issuer" of said Certificates having no assets, and having no fiscal year, did not fall within the category of issuers designated in Section 12(g) required to register outstanding securities.

12.

The common stock of Provident Life Insurance Company is exempt from the registration requirements of Section 12(g) of the Securities Exchange Act of 1934 because the regulations of North Dakota, its domiciliary state, satisfy the conditions of Section 12(g)(2)(G) of said Act.

13.

The solicitation by the Voting Trustees was "in respect of" the common stock of Provident Life Insurance Company which was not registered under Section 12(g) of the Securities Exchange Act of 1934 and was not required to be so registered by reason of the exemption therefrom provided by Section 12(g)(2)(G) thereof. Accordingly, compliance by the Voting Trustees with the provisions of Section 14(a) of said Act relating to the solicitation of proxies, consents, or authorizations was not required.

14.

That the plaintiffs have failed to prove that the original offering of Voting Trust Certificates in 1955 and 1956 violated the provisions of the securities or blue sky laws of any state.

15.

That the amended and supplemental complaint of the plaintiffs herein should be dismissed, and the defendants should be awarded their costs and disbursements herein.

That judgment should be entered according to the above and foregoing Conclusions of Law.

Dated this 29th day of January, 1973.

/s/ RONALD N. DAVIES
United States District Judge.

IN THE UNITED STATES DISTRICT COURT
For the District of North Dakota
Southwestern Division

RESERVE LIFE INSURANCE COMPANY, AND MIDLAND NATIONAL LIFE INSURANCE COMPANY, *Plaintiffs,* *vs.* PROVIDENT LIFE INSURANCE COMPANY, R. W. EDICK, JOHN E. DAVIS, CECIL R. FULLER, MILTON RUE, JR., JOHN A. ZUGER, JOHN A. ROUZIE and T. W. SETTE, as Trustees of the Provident Life Insurance Company Voting Trust Dated November 15, 1955 and Extended to November 14, 1980 and Dakota National Bank, *Defendants.*	CIVIL NO. 1040

JUDGMENT

Pursuant to the Findings of Fact, Conclusions of Law and Order for Judgment filed in this action on January 30, 1973, it is hereby

ORDERED AND DECREED that the Amended and Supplemental Complaint of the Plaintiffs herein is dismissed, with costs to the defendants to be hereinafter taxed and allowed by the Clerk of this Court in the sum of $327.15.

Dated at Fargo, North Dakota, this 6th day of February, 1973.

/s/ RONALD N. DAVIES
Senior Judge, U. S. District Court.

APPENDIX B

UNITED STATES COURT OF APPEALS,
Eighth Circuit.

RESERVE LIFE INSURANCE COMPANY and Midland National Life Insurance Company,
Appellants,
vs.
PROVIDENT LIFE INSURANCE COMPANY et al.,
Appellees.

No. 73-1241.

Submitted Oct. 16, 1973.
Decided June 21, 1974.
As amended on Denial of Rehearing July 29, 1974.

* * * * *

Before LAY and BRIGHT, *Circuit Judges,* and EISELE, *District Judge.**

BRIGHT, *Circuit Judge.*

This lawsuit originates in the efforts of management and directors of Provident Life Insurance Company (Provident), a North Dakota insurance corporation, to thwart attempts by outside interests to obtain a controlling interest in the company. In 1955, the principal officers and certain stockholders of Provident organized a voting trust for a 15-year term expiring November 15, 1970. The trust eventually procured the voting

* G. Thomas Eisele, District Judge, Eastern District of Arkansas, sitting by designation.

control of more than 60 percent of Provident's common stock. Prior to the trust's scheduled expiration date, the trustees sought permission from the trust beneficiaries to extend the trust for an additional 10 years to November 14, 1980. Upon solicitation, about two-thirds of the existing holders of voting trust certificates in Provident, representing 42.44 percent of the common stock of Provident, agreed to the extension.

During this solicitation, appellants Reserve Life Insurance Company (Reserve), a Texas insurance corporation, and Midland National Life Insurance Company (Midland), a South Dakota insurance corporation and a wholly owned subsidiary of Reserve, attempted to block the extension by contacting Provident shareholders and urging them to refuse to consent to the extension. This lawsuit is an adjunct of this attempt and was brought by Reserve and Midland to declare invalid the trustees' actions in obtaining consents for the extension of the voting trust and to require dissolution of the voting trust.[1] The action rests on allegations that, in soliciting for an extension and extending the voting trust, appellee-trustees and Provident violated the Securities Act of 1933 (15 U.S.C. §§ 77a-77aa), the Securities Exchange Act of 1934 (15 U.S.C. §§ 78a-78hh), and various provisions of the "blue sky" laws of North Dakota and other states.

The district court, Judge Ronald N. Davies, presiding, denied Reserve and Midland relief. This appeal followed. Federal jurisdiction is established since the complaint in part alleges violations of federal securities statutes. The state claims are justiciable in this proceeding as proper matters for pendent jurisdiction.

During the pendency of proceedings in the district court, Reserve and Midland asked the Securities and Exchange Commission to intervene. Representatives of the Commission refused,

1. Dakota National Bank is made a nominal party because it is the depository of the shares of stock represented by the voting trust certificates.

and thus the district court did not have the benefit of the Commission's views. Because of the novelty of some of the questions, we invited the SEC to submit its views by way of an amicus curiae brief. The Commission agreed and filed a memorandum with respect to the applicability of the 1933 and the 1934 Securities Acts. This memorandum generally supports the views of the appellants. The appellees have been given an opportunity to respond to the amicus curiae brief and the Commission has filed a reply memorandum. We have taken these additional briefs into consideration.

On appeal, Reserve and Midland now reassert their contentions, previously considered but rejected by the trial court, that:

1) The extension of the voting trust was invalid under applicable provisions of North Dakota law.

2) The solicitation of consents to the extension of the voting trust was invalid because neither the voting trustees nor Provident registered the Provident voting trust agreement under the Securities Act of 1933.

3) The solicitation of consents to the extension of the voting trust was invalid since neither the trustees nor Provident undertook to register the Provident voting trust agreement under various state "blue sky" laws.

4) The trustees failed to register the Provident voting trust agreement under provisions of the Securities Exchange Act of 1934 as amended, and thus, solicitation of the consents to extend the voting trust agreement violated the proxy regulations issued by the Securities and Exchange Commission under the 1934 Act.

We sustain the district court on the first three issues, but reverse and remand on the fourth. We examine the factual background and the proceedings in the trial court.

I.

BACKGROUND

The trial court found that the purpose of the 1955 Provident voting trust was to "stabilize [Provident's] operations, and prevent raids and take-overs." Approximately 64 percent of Provident's stockholders joined this trust by depositing their stock with the trustees and receiving voting trust certificates in exchange. Provident filed a registration statement for the voting trust certificates pursuant to the Securities Act of 1933.

Although the voting trust expired on November 15, 1970, it contained a provision for the extension of the trust reading:

> *Extension of Voting Trust.* The Trustees and any and all of the Stockholders becoming parties hereto may, by mutual consent, and from time to time, agree to extend said trust and the terms of this agreement. Any individual stockholder not caring to join in the extension of said trust and the terms of this agreement may on any expiration date surrender his or her Voting Trust Certificate or Certificates and receive a certificate of stock of Provident Life Insurance Company for the number of shares to which he or she is entitled.

During 1969, Provident's directors, as trustees of the voting trust, determined that it was in the corporation's best interests to extend the voting trust for an additional 10 years. This decision was influenced in part by the announced takeover attempts planned by Reserve and Midland and their Texas parent corporation, Sammons Enterprises, Inc. Accordingly, beginning early in December of 1969, the trustees, with the help of Provident personnel, solicited existing members of the voting trust for their consent to a 10-year extension of the trust.

As a preliminary to their attempts to persuade voting certificate holders to deny their consent to any extension of the trust, Reserve and Midland attempted to procure names and

addresses of the members of the voting trust as well as names and addresses of shareholders of the corporation. Initially, Reserve made a written demand to inspect and copy such lists. When this demand was refused, Reserve and Midland instituted lawsuits in North Dakota and in Minnesota state courts. The Minnesota state court dismissed the suit in deference to the action being brought in North Dakota, and Reserve and Midland eventually succeeded in obtaining a stockholders' list from the North Dakota state court. They did not, however, succeed in obtaining the specific names and addresses of members of the first voting trust agreement. Although the trustees filed copies of the voting trust agreement with Provident,[2] including copies of the consents obtained from members of the voting trust, Reserve and Midland could not read the signatures on these documents in some instances nor find any of the addresses because the mailing labels had been removed from the consent forms.

Reserve, Midland, and Reserve's subsidiary, American Security Life Insurance Company,[3] had purchased a number of the 1955 voting trust certificates from certificate holders. Reserve and Midland did not consent to the extension of the trust. During the pendency of this case in the trial court, Reserve and Midland exchanged all of their expiring voting trust certificates for Provident common stock. Additionally, Reserve and Midland own a substantial block of shares of Provident common stock and several voting trust certificates in the extended voting trust which were acquired in open market transactions. Reserve and

2. Provisions of the North Dakota Century Code call for a corporation to make available for examination by a shareholder to the same extent as books and records of such corporation "[t]he counterpart of the voting trust agreement so deposited with the corporation." N.D.Cent.Code § 10-19-35.

3. Before December 22, 1969, Reserve owned all of the common stock of American Security Life Insurance Company. On December 31, 1969, and prior to the institution of this lawsuit, the latter company was merged into Reserve, thereby making Reserve the owner of all of the Provident voting trust certificates formerly held by American Security.

Midland, however, did not acquire any of these voting trust certificates from the trustees of the voting trust or from Provident.

Neither the trustees nor Provident filed any registration statement for the extended voting trust certificates with the SEC or any state securities commission. Reserve and Midland, however, contend that Section 6 of the Securities Act of 1933, 15 U.S.C. § 77f, and Section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 78*l*, required the filing of registration data.[4] Moreover, if the 1934 Act required registration, appellants contend also that soliciting the consents to the extension of the voting trust violated the SEC rules governing proxy solicitation.[5] Finally, appellants contend that registration was required in all the states in which solicitations were made by the trustees. With this background, we turn to a discussion of the matters raised on appeal.

II.

THE VALIDITY OF THE VOTING TRUST UNDER NORTH DAKOTA LAW

The relevant North Dakota statute relating to voting trusts, N.D.Cent.Code § 10-19-35, reads as follows:

> Voting Trust.—Any number of shareholders of a corporation may create a voting trust for the purpose of conferring upon a trustee or trustees the right to vote or otherwise represent their shares, for a period of not to exceed

4. Although no registration was made at times here material, the trustees at the suggestion of an SEC staff member, filed a registration statement in February of 1971 relating to the voting trust certificates as extended to 1980 under § 12(g) of the 1934 Act, 15 U.S.C. § 78*l*(g). This registration became effective April 10, 1971. The trustees made this registration under protest, asserting the inapplicability of § 12 to the trust.

5. *See* § 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), and the Commission's proxy rules promulgated thereunder, Rule 14a-1 et seq., 17 C.F.R. § 240.14a-1 et seq, discussed in Part V of this opinion *infra*.

> ten years, by entering into a written voting trust agreement specifying the terms and conditions of the voting trust, by depositing a counterpart of the agreement with the corporation at its registered office, and by transferring their shares to such trustee or trustees for the purpose of the agreement. The counterpart of the voting trust agreement so deposited with the corporation shall be subject to the same right of examination by a shareholder of the corporation, in person or by agent or attorney, as are the books and records of the corporation, and shall be subject to examination by any holder of a beneficial interest in the voting trust, either in person or by agent or attorney, at any reasonable time for any proper purpose.

Reserve and Midland make two contentions in conjunction with this statute: (a) that the extension of the voting trust violated the 10-year statutory limitation, and (b) that because the trustees removed mailing labels from the consents to the extension of the trust agreements, the trustees thereby failed to file a requisite "counterpart of the voting trust agreement." The district court rejected both of these contentions and held the extension of the voting trust valid and the filings in compliance with N.D.Cent.Code § 10-19-35. We find no North Dakota case law pertinent to the issues raised, and appellants have presented no persuasive authority contrary to the determination of the trial court.

North Dakota enacted § 10-19-35 in 1957. The parties entered the initial voting trust agreement two years earlier. Appellees thus contend that the 10-year limitation of the statute does not operate restrospectively upon the 1955 trust. We agree. *See* Western Pac. R.R. v. Baldwin, 89 F.2d 269 (8th Cir. 1937); Oppenheimer v. Cassidy, 345 Ill.App. 212, 102 N.E.2d 678 (1951).

The second issue is more troublesome. Although an underlying purpose of § 10-19-35 may be the disclosure of adequate information about a voting trust to corporate shareholders and other members of the trust, the statute specifies without helpful elaboration that "a counterpart of the agreement" be deposited

with the corporation. In light of this apparent obscurity within the statute and in the absence of any relevant North Dakota case law, we defer to the trial court's experience in interpreting North Dakota law and its construction of the statute here in question. *See* Luke v. American Family Mutual Insurance Co., 476 F.2d 1015, 1019 n. 6 (8th Cir. 1972) (original panel opinion), cert. denied. 414 U.S. 856, 94 S.Ct. 158, 38 L.Ed.2d 105 (1973). Thus, we accept the trial court's conclusion that the filing of a true copy of the trust agreement and copies of the executed consents to the extension, even though without addresses, effected compliance with the terms of § 10-19-35.

III.

REGISTRATION UNDER THE 1933 ACT AND STATE LAWS

Section 5 of the Securities Act of 1933, 15 U.S.C. § 77e, in general makes it illegal to utilize the mails or other means of interstate transportation or communication in the sale or purchase of securities unless a registration statement for these securities has been filed with the SEC. But § 3(a)(9) of the 1933 Act, 15 U.S.C. § 77c(a)(9), exempts from registration:

> [a]ny security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange[.][6]

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6. In conjunction with this section, the Commission has promulgated Rule 149, 17 C.F.R. § 230.149, which attempts to further explain the term "exchanged" as used in § 3(a)(9) as follows:

> The term "exchanged" in section 3(a)(9) * * *, shall be deemed to include the issuance of a security in consideration of the surrender, by the existing security holders of the issuer, of outstanding securities of the issuer, notwithstanding the fact that the surrender of the outstanding securities may be required by the terms of the plans of exchange to be accompanied by such payment in cash by the security holder as may be necessary to effect an equitable adjustment, in respect of dividends or interest paid or payable on the securities involved in the exchange, as between such security holder and other security holders of the same class accepting the offer of exchange.

Reserve, Midland, and the SEC in its amicus brief contend that this exemption is inapplicable, while Provident and the trustees argue the contrary. As a preliminary matter, Provident and the trustees assert that Reserve and Midland lack standing under the 1933 Act to bring this action since those parties did not purchase the securities here in question from the issuer-trustees or from Provident. We considered a similar issue in Greater Iowa Corp. v. McLendon, 378 F.2d 783 (8th Cir. 1967). There we held that the term "purchasers" as used in § 12, 15 U.S.C. § 77*l*, the remedy section for private litigants under the 1933 Act, was limited only to those purchasers of such voting trust certificates who were in privity with the original issuer.[7] Although the circumstances here may be distinguishable from those in *Greater Iowa,* plaintiffs face a serious question of standing to obtain relief under the 1933 Act. The district court considered the merits of the § 3(a)(9) claim for exemption and so shall we, assuming arguendo that standing does exist in order to review the district court's ruling. Since, as we will explain below, the extensions of the voting trust certificates are exempt from registration under the 1933 Act, appellees do not suffer any prejudice by our review of the merits.

The SEC as well as Reserve and Midland take the position that the renewal of the voting trust and the resultant issuance of amended or new voting trust certificates does not constitute an exchange of securities by an "issuer with its existing security holders" within § 3(a)(9) but instead amounts to the issuance of a new security required to be registered as prescribed by § 6 of the 1933 Act, 15 U.S.C. § 77f. To reach this result, they argue that the new and old trusts must be considered

7. *But see* Kinsey v. Knapp, 154 F.Supp. 263 (E.D.Mich.), rev'd on other grounds, 249 F.2d 797 (6th Cir. 1957), cert. denied, 356 U.S. 936, 78 S.Ct. 778, 2 L.Ed.2d 812 (1958), which permitted an assignee of shares bound by a voting trust to maintain a suit attempting to void the voting trust agreement because it was not registered under the Securities Act of 1933. However the court's decision seemed to be grounded more in equity than in the statutory provisions of the Act. *Cf.* Corporation Trust Co. v. Logan, 52 F. Supp. 999 (D.Del.1943).

separate legal entities under the 1933 Act, regardless of whether state law would characterize the new and old trusts as a continuing single entity. This conclusion rests on reasoning that the original voting trust terminated as an entity in 1970 because the trustees of the existing trust could not compel any certificate holder to participate in any extension of the trust.

Additionally, the Commission argues that since the beneficent purpose of the 1933 Act is to promote full disclosure of information thought necessary for informed investment decisions, *see* Securities & Exchange Commission v. Ralston Purina Co., 346 U.S. 119, 124-125, 73 S.Ct. 981, 97 L.Ed. 1494 (1953), the § 3(a)(9) exemption ought to be construed narrowly in order to protect investors such as the present holders of extended trust certificates who should be entitled to the same safeguards afforded shareholders who contemplated exchanging shares for the original voting trust certificates.

We would agree with the contention made by appellants and the Commission if the 1955 voting trust said nothing about an extension.[8] Here, however, the original voting trust certificates contained an express provision for extension. Thus, by this language, the parties added an element of flexibility to the initial 15-year time period and evidenced an intent to participate in the voting trust arrangement for such time period as might be reasonably necessary to protect against corporate raiding.

We also note that Provident advised the Denver regional office of the SEC of plans by it and the trustees to rely on the § 3(a)(9) exemption from registration in planning to obtain consents for an extension of the voting trust for an additional 10 years. Neither Provident nor the trustees received any advice to the

8. Two leading authorities on securities laws have indicated that an extension of a previously existing voting trust falls within the § 3(a)(9) exemption when the original trust agreement contains a provision for a renewal of the trust and there is compliance with the other conditions of the section. *See* 1 Loss, Securities Regulations 574 (2d ed. 1961); H. Sowards, The Federal Securities Act in 11 Business Organizations § 3.10 at 20-1 n. 56 (1973).

contrary from that office. Additionally, one of the attorneys for the Commission informally expressed views to Reserve and Midland, who were then asking the Commission to take steps to stop the solicitation, that the § 3(a)(9) exemption applied to the extension of the voting trust. We mention these matters not as acts binding upon the Commission but as illustrations of the reasonableness of Provident's reliance on the exemption theory under the circumstances.[9]

In considering whether Provident and the trustees qualify for the exemption under § 3(a)(9) in this case, we observe the following: (1) the trustees contacted only the holders of existing voting trust certificates; (2) these certificate holders received no new certificates but rather the old certificates were stamped to show the change in the trust termination date; (3) the voting trust itself was not materially changed except for its extension—each voting trust certificate holder retained the same equitable interest in the corporation as before; and (4) according to the trial court findings, no commission or other

9. As a collateral issue in this lawsuit, Provident has argued that the inaction of the SEC's Denver office of the applicability of the exemptions under § 3(a)(9) of the 1933 Act, 15 U.S.C. § 77c(a)(9), and the views expressed by the SEC attorney that no registration of the extended voting trust was necessary under § 3(a)(9), binds the Commission and estops that body from taking a contrary position at this time since such opinions were the equivalent of a "no action" letter. We reject this argument. First, a "no action" letter was not issued by the SEC within its authorized procedure nor is it apparent that a "no action" letter was ever requested. *See* Lowenfels, SEC "No-Action" Letters: Some Problems and Suggested Approaches, 71 Columbia L.Rev. 1256, 1256-58 (1971), and Lowenfels, SEC No-Action Letters: Conflicts With Existing Statutes, Cases and Commission Releases, 59 Va.L.Rev. 303, 320-21 (1973). At best, Provident received only an opinion of a staff member of the SEC. As such, 17 C.F.R. 202.1(d) comes into play. That regulation in part reads, "opinions expressed by members of the [SEC's] staff do not constitute an official expression of the Commission's views * * *." *Cf.* Kixmiller v. SEC, 492 F.2d 641 (D.C.Cir. 1974). Moreover, as a general proposition, such inaction does not estop the Commission from assuming a contrary position later. *See* Section 26 of the 1934 Act, 15 U.S.C. § 78z; Capital Funds, Inc. v. SEC, 348 F.2d 582, 588 (8th Cir. 1965). *Cf.* SEC v. Culpepper, 270 F.2d 241 (2d Cir. 1959).

remuneration has been paid or given, directly or indirectly, for soliciting such exchange.

In sum, the conduct of the trustees seems to fall within the literal language of the exemption provided by § 3(a)(9). The terms of the initial trust which contemplated the likelihood of a continuation beyond 15 years was in fact carried out. Under all the circumstances, we think it was proper for the trial court to factually find and legally conclude that a single continuing trust existed and that the issuer-trust exchanged securities with its existing security holders within the meaning of the exemption from registration provided by § 3(a)(9) of the Securities Act of 1933.

IV.

STANDING AND EXEMPTION UNDER STATE LAWS

Questions of standing and of the applicability of similar exemptions arise under state securities laws. The trustees or Provident's employees on behalf of the trustees made solicitations for "consents" in 37 states. According to representations made in appellees' brief, none of the state laws authorize a private remedy to parties not in privity with the seller for the failure to register a security. Thus the standing issues represent a serious obstacle to appellants' claims arising under the state statutes. In any event, assuming standing, the state laws applicable here provide for an exemption essentially identical to the § 3(a)(9) exemption in the 1933 federal enactment.

We note that the Commissioner of Securities of the State of North Dakota advised Provident that no registration was required under provisions of the North Dakota securities laws by reason of an exemption similar to § 3(a)(9) contained in the North Dakota securities laws. *See* N.D.Cent.Code § 10-04-06 (7). The South Dakota Commissioner of Securities advised Provident that the solicitation for renewal of the existing voting trust was exempt from registration in South Dakota. We find it

unnecessary to examine the "blue sky" laws in all other states in which the solicitations took place. Reserve and Midland make no showing that it acquired any voting trust certificates in any state other than North Dakota and South Dakota. Moreover, appellants have not furnished us with the provisions of any other state statute which might provide a basis for a declaration of invalidity of the voting trust certificates held by them. Accordingly, we believe that these state laws exempt Provident or the trust from registration in the same manner as the § 3(a)(9) exemption, and we therefore sustain the district court's ruling that no violation is shown of state "blue sky" laws.

V.

SECURITIES ACT OF 1934

Appellants and the SEC contend that if a single continuing voting trust is deemed to exist for the extended period of the trust, the trust was required to register under § 12(g) of the Securities Exchange Act of 1934, 15 U.S.C. § 78*l*(g). Concomitantly, they assert that the voting trustees, in seeking to extend the voting trust, solicited a "proxy or consent or authorization" in contravention of § 14(a) of the Act, 15 U.S.C. § 78n(a) and the Commission's proxy rules, Rule 14a-1 *et seq.*, 17 C.F.R. § 240.14a-1 *et seq.*

The trial court found that there was no duty to register the voting trust certificates and thus no need for compliance with the proxy requirements. We examine these contentions in light of our earlier determination made in Part III of this opinion concerning the § 3(a)(9) exemption under the 1933 Act that the voting trust should be considered a single continuing trust extending beyond the initial 1970 termination date.

Absent an exemption, § 12(g) of the 1934 Act requires an "issuer" whose securities are traded "by use of the mails or any means or instrumentality of interstate commerce" to register

equity securities if its "total assets" exceed one million dollars and if the class of equity securities is held of record by 500 or more persons. An "issuer" includes the trustees of a voting trust under § 3(a)(8) of the 1934 Act, 15 U.S.C. § 78c(a)(8), and according to Rule 3a11-1, 17 C.F.R. § 240.3a11-1, an "equity security" includes voting trust certificates.[10]

The record establishes that more than 500 persons held the certificates issued by the original trust and that more than 500 persons now hold the certificates issued by the extended trust. Therefore, if the voting trust holds "total assets" exceeding one million dollars, its securities are required to be registered with the Commision pursuant to § 12(g). Of course, the trust itself holds no assets except the stock certificates for which the trustees exercise only voting rights and possess bare legal title. Section 12(g)(5) of the 1934 Act, 15 U.S.C. § 78*l*(g)(5), however, gives the Commission the power to define "total assets" for the purposes of § 12(g) and the Commission has by rule provided that the total assets of an issuer whose securities are deposited in the voting trust shall also be deemed to be the "total assets" of the trust. See Rule 12g5-2, 17 C.F.R. § 240.12g5-2. Since the total assets of Provident Life Insurance Company, the original issuer, exceed $84,000,000, the original trust, which held approximately 64 percent of Provident's common stock and the renewed trust, which now holds about 42 percent of its stock, easily meet the "total assets" requirements of § 12(g), as defined by the Commision rules.[11] Accordingly, under these rules, the

10. Rule 3a11-1, 17 C.F.R. § 240.3a11-1, was promulgated by the Commission pursuant to § 3(a)(11) of the 1934 Act, 15 U.S.C. § 78c(a)(11), which defines "equity security" to include "any stock or similar security" and authorizes the Commission to further define the term.

11. Although the appellees contend that the Commission lacks authority to so define the term "total assets" of a trust in this manner, we note that § 12(g)(5), 15 U.S.C. § 78*l*(g)(5), permits the Commission to define " 'total assets' * * * as it deems necessary or appropriate in the public interest or for the protection of investors in order to prevent circumvention of the provisions of [§ 12(g)]." We think the adoption of the Commission's attribution rule relating to trusts is in accord with the purposes stipulated by this statute.

district court erred in determining that the trust held no assets.

To be sure, the voting trust certificates which were extended may be viewed as securities issued by Provident, a life insurance company, and thus exempt from the registration requirements of § 12(g) pursuant to § 12(g)(2)(G), 15 U.S.C. § 78*l*(g)(2)(G), which creates an exemption from registration for "any security issued by an insurance company." The availability of this exemption, however, depends specifically upon the applicability of state regulation with respect to annual reports, proxy solicitations, and disclosure of securities transactions by officers, directors, and substantial shareholders. *See* § 12(g)(2)(G)(i), (ii), and (iii), 15 U.S.C. § 78*l*(g)(2)(G)(i), (ii), and (iii). Nevertheless, while the statute may manifest Congress' assumption that state regulation may be an adequate basis for the exemption of an insurance company's stock, there is no suggestion in the statute or its legislative history that such state regulation provides an adequate substitute for registration of a *voting trust* that holds an insurance company's stock. Thus we hold that the exemption contained in § 12(g)(2)(G) is unavailing to the trustees of the voting trust and that the provisions of § 12 of the Securities Exchange Act require the trustees to register the voting trust certificates.

The obligation to register under § 12 brings into play the provisions of § 14(a) of the 1934 Act, 15 U.S.C. §78n(a), which reads in relevant part:

> It shall be unlawful for any person * * * in contravention of such rules and regulations as the Commission may prescribe * * * to solicit * * * any proxy or consent or authorization *in respect of any security* (other than an exempted security) *registered* pursuant to section 78*l* [of the 1934 Act]. (Emphasis added).

With respect to § 14(a), the district court found that if there was a solicitation it was a solicitation by the trustees *in respect of* the Provident Life common stock, which was to be redeposited in the trust, and not *in respect of* the trust certificates. Thus the

court held § 14(a) inapplicable in this case because the underlying Provident common stock as stock of an insurance company is exempt from registration under § 12(g) of the 1934 Act.

The creation and the extension of the voting trust does amount to a solicitation of a proxy in respect to securities deposited with the trustees. We so held in Greater Iowa Corp v. McLendon, *supra,* 378 F.2d at 786. To that extent, the district court was correct in stating that there was a solicitation *in respect of* the Provident Life stock when the defendants sought to extend the trust and, thus, the transaction fell outside the purview of § 14(a). But a further question is presented under the particular facts of this case—whether the solicitation was also *in respect of* the trust certificates—as Reserve and Midland contend. That issue was not resolved in *Greater Iowa.*

Here, as we have already held, the extension of the Provident voting trust constituted a continuation of the initial security; thus the extension of the term of the old trust certificates was exempt from registration pursuant to § 3(a)(9) of the Securities Act of 1933. It follows that when the voting trustees solicited the proxy, that is, the "consent or authorization"[12] of certificate holders to participate in the extended term of the trust, those solicitations were *in respect of* the trust certificates, as well as *in respect of* the Provident Life securities.

We think that the legislative policy underlying enactment of § 14(a) of the 1934 Act supports this legal conclusion. In *Greater Iowa,* we commented that:

> The purpose of [§ 14(a)] becomes clear, to provide full and honest disclosure by those who are seeking to maintain or gain control of a corporation through solicitation of the corporate voting rights of the shareholders. Corporate suffrage is an important incident of corporate ownership and is a right deserving of careful protection. Consequently, standards of conduct have been established for parties who

12. Rule 14a-1(d), 17 C.F.R. § 240.14a-1(d), defines the term "proxy" to include "every proxy, consent, or authorization within the meaning of section 14(a) of the [1934] Act."

> seek the voting rights of others, and all contestants for these voting privileges are held to the same high standard of fair play and open disclosure. [378 F.2d at 795.]

See J. I. Case Co. v. Borak, 377 U.S. 426, 431-432, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964). Moreover, in commenting on the congressional intent to give the terms "proxy," "consent," and "authorization" the broadest meaning necessary to effectuate the 1934 Act's salutary purposes, we observed in *Greater Iowa:*

> By including all of these words in the disjunctive, we believe Congress intended to cover the entire field of solicitation for corporate control and all of the various solicitation situations which might arise from time to time, whether conventional, novel, irregular or unorthodox. [378 F.2d at 796.]

Certainly here the solicitation for the extension of the terms of the trust constituted a solicitation for the trustees' right to exercise indirect control over the corporation for many years since the trustees thereby obtained a continuation of the power to ensure re-election of present directors or replacements friendly to Provident's management.

We hold solicitations for the extension of the voting trust in this case amounted to solicitations of proxies and such conduct came within the strictures of the proxy rules as promulgated by the SEC. *See* Rule 14a-1 et seq., 17 C.F.R. § 240.14a-1 et seq. Under these rules, an atmosphere of "fair play" must pervade the solicitation of proxies so that in struggles for corporate control like the present one, competing interests are furnished equal opportunities to communicate with and thereby influence the shareholders in the exercise of their corporate suffrage rights. Specifically, the SEC has established the requirement that when management of an issuer conducts or intends to conduct a proxy solicitation and receives a written request by a security holder entitled to vote on the matter,[13] management must either

13. Since at material times, Reserve or Midland held voting trust certificates which had been obtained from shareholders who initially joined the voting trust in 1955, they were entitled to invoke the applicable provisions of Rule 14a-7, 17 C.F.R. § 240.14a-7.

mail opposition material of the security holder to enfranchised security holders *see* Rule 14a-7(b)(1) and (2), 17 C.F.R. § 240.14a-7(b)(1) and (2), or furnish the security holder with a reasonably current list of the names and addresses of such security holders and other interested persons, *see* Rule 14a-7(c), 17 C.F.R. § 240.14a-7(c). Here, however, Provident's management and the trustees refused to furnish to Reserve and Midland the names of stockholders, except on order of the North Dakota court, and, successfully resisted the efforts of appellants to obtain a list of the names and addresses of the certificate holders of the voting trust. As a result of this, Reserve and Midland were effectively precluded from an equal oportunity to communicate with the participants of the trust, contrary to the purpose intended by the Commission's proxy rules and § 14(a).

VI.

REMEDY FOR VIOLATING THE 1934 ACT

Reserve and Midland request that we declare the consents to the extension of the voting trust argeement void or voidable, that we restrain and enjoin the appellees from acting under the terms of the trust agreement, and that we require provident and the trustees to make available to appellants the names and addresses of those persons presently holding voting trust certificates in the event further solicitation is permitted.

In suits to redress violations of § 14(a) of the 1934 Act, federal courts under their equitable powers may grant all relief necessary to effectuate the congressional purposes of the Act. *See* J. I. Case Co. v. Borak, *supra. Cf.* Securities and Exchange Commission v. Transamerica Corp., 163 F.2d 511 (3d Cir. 1947), cert. denied, 332 U.S. 847, 68 S.Ct. 351, 92 L.Ed. 418 (1948).

Section 29(b) of the 1934 Act, 15 U.S.C. § 78cc(b), affords a specific remedy relative to contract rights, and reads in pertinent part:

> (b) Every contract made in violation of any provision of this title or of any rule or regulation thereunder * * * shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract * * *.

This section has been construed to create a rule of voidability at the option of an innocent party. *See* Greater Iowa Corp. v. McLendon, *supra*, 378 F.2d at 792, and cases cited therein.

Reserve and Midland hold voting trust certificates which they obtained by assignment. According to the terms of the voting trust agreement, "[e]very transferee of a Trust Certificate or Certificates issued hereunder shall, by the acceptance of such Trust Certificate or Certificates, become a party hereto with like effect as though an original party [to the agreement]." Thus, we think it clear that in this case appellants Reserve and Midland as assignees acquired the contractual rights of their assignors and have become parties to the contract. As such, under the statute, they may avoid the limiting terms of the extended voting trust.

As previously noted, the Provident voting trust was initially formed and its term later extended to prevent the raiding of corporate control by such groups as Reserve, Midland, and their parent company, Sammons Enterprises, Inc. The members of that voting trust (other than appellants) may very well wish to continue existing arrangements with the trustees to resist attempts by appellants or others to gain control of Provident. The trial court may take cognizance of this continued effort by shareholders of Provident to present a common front against plaintiffs' efforts to take over their company. Thus, in the exercise of its equitable discretion, the trial court may give Provident and the trustees an opportunity to reaffirm the voting trust with the present certificate holders, other than Reserve and Midland, subject, however, to the requirements of Rule 14a-1 et seq.

Accordingly, we remand this case for the entry of a judgment in conformity with this opinion. Should Provident and the trustees seek permission to attempt to obtain reaffirmance of the voting trust with its certificate holders, the district court shall pass on such application and if approved shall enter such orders as may be appropriate to assure that full, fair, and complete disclosure of information is afforded all voting certificate holders by the appellees as well as by appellants.[14] The trial court should issue such other orders as will protect the rights of all parties and retain the status quo of the voting trust, except with respect to the extended voting trust cerificates heretofore acquired by Reserve and Midland, pending any resolicitation. As to voting trust certificates obtained by Reserve and Midland prior to the filing of this opinion, Provident will be required to exchange them for the underlying common stock represented by these certificates.

We remand with no costs assessed against either party.

Remanded.

---

14. The following language from *Greater Iowa Corp.* seems most apt to any resolicitation: [W]e do think that any solicitation for proxies or authorizations or consents to a particular course of conduct affecting corporate operation should be conducted under the rules of full, fair and complete disclosure * * *. Management must adhere to this standard and the well-meaning dissidents should do likewise. It is only by the application of this single standard of conduct that the corporate suffrage of each security holder can be fully protected. In this struggle for corporate dominance or control, a meaningful choice should be presented to the security holder, who is in turn fully armed with a complete and fair disclosure of all relevant information pertaining to the exercise of his corporate suffrage. [378 F.2d at 798.]

APPENDIX C

CONSTITUTION OF THE UNITED STATES

TENTH AMENDMENT:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Securities Act of 1933:

SECTION 3(a)(9) (48 Stat. 906) (15 U. S. C. § 77c(a)(9)):

(a) Except as hereinafter expressly provided, the provisions of this title shall not apply to any of the following classes of securities:

. . .

(9) Any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange;

Securities Exchange Act of 1934:

SECTION 12(g)(1) (78 Stat. 565) (15 U. S. C. § 78*l*(g)(1)):

(g)(1) Every issuer which is engaged in interstate commerce, or in a business affecting interstate commerce, or whose securities are traded by use of the mails or any means or instrumentality of interstate commerce shall—

(A) within one hundred and twenty days after the last day of its first fiscal year ended after July 1, 1964, on which the issuer has total assets exceeding $1,000,000 and a class of equity security (other than an exempted security) held of record by seven hundred and fifty or more persons; and

(B) within one hundred and twenty days after the last day of its first fiscal year ended after two years from July 1, 1964, on which the issuer has total assets exceeding $1,000,000 and a class of equity security (other than an exempted security) held of record by five hundred or more but less than seven hundred and fifty persons,

register such security by filing with the Commission a registration statement (and such copies thereof as the Commission may require) with respect to such security containing such information and documents as the Commission may specify comparable to that which is required in an application to register a security pursuant to subsection (b) of this section. Each such registration statement shall become effective sixty days after filing with the Commission or within such shorter period as the Commission may direct. Until such registration statement becomes effective it shall not be deemed filed for the purposes of section 18 of this title. Any issuer may register any class of equity security not required to be registered by filing a registration statement pursuant to the provisions of this paragraph. The Commission is authorized to extend the date upon which any issuer or class of issuers is required to register a security pursuant to the provisions of this paragraph.

SECTION 12(g)(2)(G) (78 Stat. 567-568) (15 U. S. C. § 78*l*(g)(2)(G)):

(2) The provisions of this subsection shall not apply in respect of—

(G) any security issued by an insurance company if all of the following conditions are met:

(i) Such insurance company is required to and does file an annual statement with the Commissioner of Insurance (or other officer or agency performing a similar function) of its domiciliary State, and such annual statement conforms to that prescribed by the National Association of Insurance Commissioners or in the determination of such State commissioner,

officer or agency substantially conforms to that so prescribed.

(ii) Such insurance company is subject to regulation by its domiciliary State of proxies, consents, or authorizations in respect of securities issued by such company and such regulation conforms to that prescribed by the National Association of Insurance Commissioners.

(iii) After July 1, 1966, the purchase and sales of securities issued by such insurance company by beneficial owners, directors, or officers of such company are subject to regulation (including reporting) by its domiciliary State substantially in the manner provided in Section 16 of this title.

SECTION 14(a) (78 Stat. 569) (15 U. S. C. § 78n(a)):

(a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or oppropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title.

SECTION 14(d)(1) (82 Stat. 455 and 84 Stat. 1497) (15 U. S. C. § 78n(d)(1)):

(d) (1) It shall be unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to section 12 of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 12 (g) (2) (G) of this title, or any equity security issued by a closed-end investment company registered under the

Investment Company Act of 1940, if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such of the information specified in section 13(d) of this title, and such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. All requests or invitations for tenders or advertisements making a tender offer or requesting or inviting tenders of such a security shall be filed as a part of such statement and shall contain such of the information contained in such statement as the Commission may by rules and regulations prescribe. Copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors, and shall be filed with the Commission not later than the time copies of such material are first published or sent or given to security holders. Copies of all statements, in the form in which such material is furnished to security holders and the Commission, shall be sent to the issuer not later than the date such material is first published or sent or given to any security holders.

NOV 18 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-423

PROVIDENT LIFE INSURANCE COMPANY, R. W. EDICK, ET AL., AS TRUSTEES OF THE PROVIDENT LIFE INSURANCE COMPANY VOTING TRUST DATED NOVEMBER 15, 1955, AND EXTENDED TO NOVEMBER 14, 1980,

Petitioners,

vs.

RESERVE LIFE INSURANCE COMPANY AND MIDLAND NATIONAL LIFE INSURANCE COMPANY,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The respondents oppose the granting of the petition for a writ of certiorari for the reasons hereinafter stated.

STATEMENT AS TO REASONS WHY A WRIT SHOULD NOT ISSUE

I

There is no conflict between the decision of the Court of Appeals for the eighth Circuit and the decision of the Court of Appeals for the Second Circuit as claimed by the petitioners.

II

The decision of the Court of Appeals in this matter on the issue raised by the petition for the writ is not in conflict with applicable decisions of this Court.

III

The issues raised by the writ do not involve important questions of Federal law which require settlement by this Court.

IV

The Court of Appeals has not so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

V

The decision of the Court of Appeals was correct on the issue raised by the petition and should be left standing by denial of the writ.

SUPPLEMENT TO STATEMENT OF PETITIONER AS TO THE FACTS AND HISTORY OF THE ACTION

The trustees of the voting trust for certain Provident Life Insurance shareholders constituted seven of the thirteen mem-

bers of the Board of Directors, or a majority thereof. (R4, admitted because not denied R21.) Provident Life Insurance Company was made a party only for the purpose of having it directed, if the action was successful to cause common stock certificates to be issued to the voting trust certificate holders following a declaration by the Court that the voting trust was invalid or void. The actual contest is between the respondents and the voting trustees seeking to maintain their control of the company through the medium of the voting trust over a period of 25 years. The Court of Appeals (Appendix B, page A35 of the petition) aptly stated the situation:

> "Certainly here the solicitation for the extension of the terms of the trust constituted a solicitation for the trustees' right to exercise indirect control over the corporation for many years since the trustees thereby obtained a continuation of the power to insurer re-election of present directors or replacements friendly to Provident's management."

Provident refused to furnish the respondents with the names and addresses of the voting trust certificate holders so that the views of the respondents as to whether the extension agreement should be executed could be expressed (Appendix B of the petition, Page A23.) Although copies of the voting trust agreement were filed with Provident the same were not true copies since the mailing labels were removed from the consent forms so that examination of the voting trust agreement on file with Provident did not disclose the names (See Appendix B, page A23 and see R2, page 99 for description of a consent form with the mailing label attached but which labels were all removed on filing with Provident so as to make it impossible for any shareholder or certificate holder to secure addresses for the purpose of contacting certificate holders).

The regulations adopted by the Commissioner of Insurance of the State of North Dakota effective May 1, 1966 in response to the requirements of Section 12 (g) (2) (G) [15 U.S.C. Section 78 (1) (g) (2) (G)] (See Appendix C A40 of the

petition wherein the standard form proposed by the National Association of Insurance Commissioners was described.) The regulations were offered as a part of the record. See Plaintiff's Exhibit 32, page 103 of R2 but were not set out in the record for the Court of Appeals because the parties stipulated that it was the contention of the Plaintiffs that the regulations have no application to voting trusts on the ground that they were regulated by the Securities and Exchange Act of 1934 as amended and that there was no jurisdiction on the part of the Insurance Commissioner of the State of North Dakota to regulate voting trust certificates and finally that there was no reference in the regulations to voting trust certificates.

ARGUMENT

I

There is no conflict between the decision of the Court of Appeals for the Eighth Circuit and the decision of the Court of Appeals for the Second Circuit as claimed by the Petitioners.

Since the amendment of Section 12 of the Securities and Exchange Act of 1934 to add Section 12 (g) (1) [15 U.S.C. Section 78 (1) (g) (1)] in 1964 the obligation was cast on every issuer of securities having total assets exceeding $1,000,000.00 and a class of equity security (other than an exempted security) held of record by 750 or more persons to register within 120 days after the last day of its fiscal year ended after July 1,1964. (See Appendix C page A39 of the petition.) Exemption was provided under 12 (g) (2) (G) [15 U.S.C. Section 78 (1) (g) (2) (G)] for any security issued by an insurance company if certain conditions were met (see A40 of Appendix C of the petition). Prior to the adoption of this amendment, registration was required only for securities listed on a national securities exchange and therefore unlisted securities were not subject to the proxy requirements until 1964. (See 12 (g) of the Securities

and Exchange Act (15 U.S.C. 78 (1) (a) through (f).) A voting trust certificate issued by trustees of a voting trust where the underlying security is the stock of an insurance company is issued by the voting trustees and not by the insurance company and this was the holding of the Court of Appeals (A33 Appendix B of the petition). The Court of Appeals (see same reference) stated:

> "Thus we hold that the exemption contained in Section 12 (g) (2) (G) is unavailing to the trustees of the voting trust and that the provisions of Section 12 of the Securities Exchange Act require the trustees to register the voting trust certificates.
>
> The obligation to register under Section 12 brings into play the provisions of Section 14 (a) of the 1934 Act, 15 U.S.C. Section 78 (n) (a), which reads in relevant part:
>
> 'It shall be unalwful for any person * * * in contravention of such rules and regulations as the Commission may prescribe * * * to solicit * * * any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to Section 78 (1) of the 1934 Act.' "

The petitioners contend that this holding of the Court of Appeals of the Eighth Circuit that if there was an obligation to register and no registration was made then the provisions of Section 14 (a) of the 1934 Act (15 U.S.C. Section 78 (n) (a) came into effect and it was unlawful for the trustees of the voting trust agreement to solicit a proxy or consent in respect to the securities of the trust, is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in Republic Technology Fund, Inc. vs. Lionel Corp., 483 F.2d 540 (C.A.2, 1973) (cert. denied 39 L.Ed. 2d 472) (1974).

In taking the position that there is a conflict between the decision of the Court of Appeals in this case and the Lionel Corp. case, cupra, the petitioners are overlooking the fact that the Lionel Corp. case was decided on facts that arose prior to 1964. The case in the Court of Appeals of the Second Circuit was on appeal from the decision of the United States District

Court for the Southern District of New York, 345 F.Supp. 656 and the merger of a corporation known as Hathaway, as clearly appears from the opinions in both the Court of Appeals and in the District Court, occurred on November 6, 1961. It was claimed that unaudited financial statements contained in the Hathaway proxy statement on which the plaintiffs relied in exchanging their shares in the merger with Lionel, contained materially false and misleading statements. Liability was claimed under Section 10 (b) of the Securities Exchange Act of 1934, 15 U.S.C. 78 (j) (b) and Rule 10 (b)-5 promulgated thereunder and Section 14 (15 U.S.C. Section 78 (n) and Rule 14 (a)-9). All the way through both the opinion of the District Court and the opinion in the Court of Appeals it is clear that the Hathaway common stock was unregistered. Obviously not having been registered or listed on a national exchange it was not subject to the requirements of the 1934 Act as amended in 1964 which required companies having assets exceeding $1,000,000.00 and a class of equity security held of record by more than 750 persons to register. Obviously, the District Court when it said:

> "Since Hathaway's common stock was not registered under Section 12 of the Securities Exchange Act of 1934, the Hathaway proxy statement was not subject to Section 14 and Rule 14 (a)-9 of the Act."

was correct in this holding. Likewise, when the Court of Appeals (page 545 of its opinion) said:

> "We commence by agreeing with the District Judge respect to his treatment of the claim under the Securities Exchange Act, Section 14 and Rule 14 (a)-9. The claimed violation of the proxy rules must fail because the proxies were not solicited 'in respect of any security * * * registered pursuant to Section 12' of the Act."

was clearly correct since the requirement for registration of the stock of a company not listed on a national exchange did not come into being until 1964 when Section 12 was amended by the addition of subsections (g), (h) and (i) to cover a large class of over-the-counter stocks.

The petitioner at page 15 of the petition cites the District Court case of Bound Brook Water Company vs. Jaffe, 284 F. Supp. 704, and the same case in CCH Fed. Sec. L. Reptr. paragraph 92243 at PP 97, 141-96, 142, a decision of the District Court of New Jersey in 1968. This case arose after the adoption of the amendments to Section 12 (g) of the Securities Exchange Act of 1964 but it does not appear from the two opinions of the District Court that Bound Brook Water Company had the requisite amount of assets and number of shareholders to require that its stock be registered. If in fact it did have enough assets and enough shareholders so that it should have been registered, then the decision would be applicable but we point out that this is a District Court decision and not a decision of a Court of Appeals and therefore does not involve a conflict of decisions between two Circuit Courts of Appeal. Counsel for the petitioner in the petition at page 15 cites the case of Upson vs. Ottis, 155 F.2d 606 (C.A.2, 1946) as establishing that the Second Circuit has squarely held that failure to register when registration should have been made, makes the provisions of an act inapplicable. The suit was a stockholders' derivative action to recover damages against certain persons connected with Automatic Product Corporation. It also clearly appears that under the complaint relief could be granted either under the Investment Company Act of 1940 or under New York law. It did appear that SEC had brought an action alleging that Automatic had unlawfully failed to register under the Investment Company Act. As a result of negotiations Automatic subsequently registered under the Investment Company Act of 1940. Since the Court of Appeals found the parties involved liable and granted relief under New York law, it does not clearly appear that the Second Circuit Court of Appeals squarely faced the effect of failing to register when registration should have been made. It does not even appear from the very poor record in the case that registration by Automatic was actually required.

To further illustrate that there is doubt about the holding of Upson vs. Ottis, supra, see Securities and Exchange Commis-

sion vs. S. & P. National Corp., 273 F.Supp. 863, where in connection with the approval of a plan of settlement and reorganization the possibility of commencing suits for a violation of the Investment Act of 1940 was considered. The Court said: (page 869)

> "Do the provisions of the 1940 Act, in respect of the voidability of transactions between a registered investment company and its affiliates, apply to affiliates of such unregistered investment companies as the corporate defendants were until the trustee caused them to be registered after April 18, 1966? Cf. Upson vs. Ottis, 155 F.2d 606, 610 (2d Cir.). If Upson be not, as it may not be, determinative of the question, the Plan obviates the necessity of determining it in the trustees' projected lawsuit."

On another point at page 21 of the petition counsel for the petitioner cites Sawyer vs. Pioneer Mill Co., Ltd., 190 F.Supp. 21, 23 (D. Hawaii, 1960), 300 F.2d 200, Cert. denied, 371 U.S. 814, to the effect that if registration of a security is not required because of exemption under Section 12 (g) (2) (G) the same are not subject to the provisions of Section 14 (a). It appeared that the capital stock of the corporation had been and was listed at the time of the litigation on the Honolulu stock exchange but had not been registered pursuant to the Securities Exchange Act of 1934 on Honolulu stock exchange; that it had never been listed on the Pacific Coast stock exchange and never registered on that exchange but that the capital stock was admitted to unlisted trading privileges on the Pacific Coast stock exchange; that the Honolulu stock exchange had been exempted by order of the Securities and Exchange Commission from registration under the provisions of the Securities Exchange Act of 1934 as a national securities exchange. The case involved an effort to enjoin the holding of a special stockholders meeting and from the use of certain proxy material on the ground that it violated the Securities Exchange Act of 1934. The Court held that there was no jurisdiction since there was no requirement for registration. This case clearly helps to

emphasize that there is no conflict between the decision in our case and the decision of the Circuit Court of Appeals for the Second Circuit in Republic Technology Fund, Inc. vs. Lionel Corp., supra.

Finally, this brings us to consideration of the statement in 5 Loss "Securities Regulation", 2718 (Second Edition, 1969) a portion of which is quoted at the top of page 17 of the petition, where Professor Loss states:

> "Do Sections 13, 14 and 16 apply when a class of securities should be registered under Section 12 (g) but has not been? A negative answer is suggested not only by a literal reading of these three sections, which apply only to 'registered' securities, but also by the legislative history."

However, counsel for the petitioners omitted the balance of the statement by Loss after referring to the fact that several bills involving Securities and Exchange legislation, that were not passed would have applied to Sections 13, 14 and 16 to securities "registered or required to be registered", which we think is important. Professor Loss continued:

> "Nevertheless, the Commission has taken the position that various provisions of the Investment Company Act do apply to companies that should register but do not. Townsend Corporation of America, Investment Company Act release 4045. (1964) 41-42. Contra Upson vs. Ottis, 155 F.2d 606, 610 (2d Cir. 1946) Cf. Sec. vs. S & P National Corporation, 273 F. Supp. 863, 869 (S.D.N.Y. 1967), referred to as an open question.
>
> If the Commission's view is wrong – there is presumably some limit to the administrative or judicial rewriting of statutes in order to repair drafting oversights – injunctive and criminal proceedings would still lie, of course, for violation of Section 12 (g) (1) itself. The question therefore assumes practical importance, therefore, only in the context of civil liability. * * * The plaintiff that would otherwise seek private relief for violation of the proxy rules (see pages 932 et seq., supra) might be better advised to argue not (1) that Section 14 could be or had been

> violated by an unregistered company but (2) that a company that was about to solicit or had solicited proxies, when it was in violation of the registration requirements of Section 12 (g) (1) should no more be permitted to enjoy the fruits of its violation than a company whose proxy solicitation had violated Section 14. Cf. Schwartz vs. Bowman, 156 F. Supp. 361, 364 (S.D.N.Y. 1957). Appeal dismissed sub. nom. Schwartz vs. Eaton, 264 F.2d 195 (2d Cir. 1959), infra page 2900 (violation of registration provision of Investment Company Act). Moreover, this latter argument should be equally available to the Commission itself in an injunctive action directed to the proxy solicitation of a company that was in violation of the registration requirement."

In our case the Securities and Exchange Commission at the invitation of the Court of Appeals filed a brief amicus suraie and took the position that failing to register could not absolve the voting trustees of their obligations to register and at page 10 of the memorandum for the Securities and Exchange Commission the following statement was made:

> "If we are correct that the voting trust should have registered its certificates under Section 12 (g), the fact that it has violated the law by failing to register cannot absolve it of obligations it would have had as a registered issuer – specifically the obligation to comply with the proxy requirements of the Act. Cf. Grossman v. Young, 72 F. Supp. 375, 378 (S.D. N.Y., 1947); Schwartz v. Bowman, 156 F. Supp. 361, 364 (S.D. N.Y., 1957), appeal dismissed sub nom., Schwartz v. Eaton, 264 F. 2d 195 (C.A. 2, 1959)."

II

The decision of the Court of Appeals in this matter on the issue raised by the petition for the writ is not in conflict with applicable decisions of this Court.

Rule 19 indicates as one of the grounds for the granting of a writ of certiorari that the Court of Appeals has decided a Federal question in a way in conflict with applicable decisions

of this Court. We do not find that the petitioner claims or has cited any applicable decision of this Court on the point and therefore it is urged that there is no ground for granting the writ of certiorari on this phase or provision of the rule.

III

The issues raised by the writ do not involve important questions of Federal law which require settlement by this Court.

While counsel for the respondents have not been able to find any statistics as to the number of voting trusts that have been involved in either registration under the Securities Act of 1933 or the Securities and Exchange Act of 1934, it is asserted upon information orally given by members of the staff of the Securities and Exchange Commission that the number of filings involving voting trusts is very small as compared to regular filings for other types of securities. A quick glance through the Life-Health edition of Best's Life Insurance Reports for 1974 fails to disclose (although it is not represented that a company by company check has been made) any companies controlled by voting trusts except Provident Life Insurance Company and one other North Dakota company. Much more prevalent now is the control of insurance companies by holding companies. Certainly it could not be asserted that a holding company which had only the stock of an insurance company as its assets could claim exemption because its securities related to the securities of an insurance company. Likewise, voting trust certificates are not issued by an insurance company any more than stock of a holding company is issued by the insurance company whose stock constitutes the assets of a holding company.

To further establish that there is no important question of Federal law requiring settlement by this Court, we note that the only cases of which we have any knowledge that involve the

relationship of voting trusts to the Federal Securities Laws in addition to this case were the following:

> Corporation Trust Co. vs. Logan, 52 F. Supp. 999, the leading case on the subject of the requirement to register voting trust certificates before solicitation is made of the general public (decided December 11, 1943).
>
> Greater Iowa Corporation vs. McLendon, 378F. 2d 783 (Eighth Circuit Court of Appeals, decided May 19, 1967).
>
> Knapp vs. Kinsey, 249 F. 2d 797 (Court of Appeals, Sixth Circuit, decided December 6, 1957).

IV

The Court of Appeals has not so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

In this case the Court of Appeals has required the trustees of the voting trust who use the voting trust as a means of controlling Provident Life Insurance Company to give the voting trust certificate holders of the voting trust the opportunity to make an informed decision and in connection therewith to have the benefit of the viewpoint of the petitioners in making such decision. This decision is in accordance with the accepted and usual course of judicial decisions of this Court and that therefore it does not appear necessary that this Court take this case in order to exercise its power of supervision.

One of the leading cases on the subject of proxy solicitations, and the use of the terms "proxy, consent and authorization" is J. I. Case Co. vs. Borak, 377 U.S. 426, 431-432, 84 S.Ct. 1555, 12 L.Ed. 2d 423, where this Court said:

> "While the respondent contends that his Count 2 claim is not a derivative one, we need not embrace that view, for we believe that a right of action exists as to both derivative and direct causes.
>
> The purpose of Section 14 (a) is to prevent management or others from obtaining authorization for corporate

action by means of deceptive or inadequate disclosure in proxy solicitation. The section stemmed from the congressional belief that '(f) air corporate suffrage is an important right that should attach to every equity security bought on a public exchange.' HR Rep No. 1383, 73d Cong, 2d Sess, 13. It was intended to 'control the conditions under which proxies may be solicited with a view to preventing the recurrence of abuses which * * * (had) frustrated the free exercise of the voting rights of stockholders.' Id., at 14. 'Too often proxies are solicited without explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought.' S Rep No. 792, 73d Cong, 2d Sess, 12. These broad remedial purposes are evidenced in the language of *the section which makes it 'unlawful for any person * * * to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security * * * registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.' (Italics supplied.) While this language makes no specific reference to a private right of action, among its chief purposes is 'the protection of investors', which certainly implies the availability of jucicial relief where necessary to achieve that result.

The injury which a stockholder suffers from corporate action pursuant to a deceptive proxy solicitation ordinarily flows from the damage done the corporation, rather than from the damage inflicted directly upon the stockholder. The damage suffered results not from the deceit practiced on him alone but rather from the deceit practiced on the stockholders as a group. To hold that derivative actions are not within the sweep of the section would therefore be tantamount to a denial of private relief. Private enforcement of the proxy rules provides a necessary supplement to Commission action."

V

The decision of the Court of Appeals was correct on the issue raised by the petition and should be left standing by denial of the writ.

Following the passage of the Securities Exchange Act of 1934 the Commission adopted regulations to put into effect the provisions thereof and regulation 12B dealing with registration and reporting was adopted and Rule 12b-2 defined the term "fiscal year" as follows:

> "The term 'fiscal year' means the annual accounting period or, if no closing date has been adopted, the calendar year ending on December 31."

and following amendment of Section 12 by the addition of Sections 12 (g) (h) (i) adopted Rule 12g5-2 defining "total assets" as follows:

> "For the purpose of Section 12 (g) (1) of the Act the term 'total assets' shall mean the total assets as shown on the issuer's balance sheet or the balance sheet of the issuer and its subsidiaries consolidated, whichever is larger, as required to be filed in the form prescribed for registration under this section and prepared in accordance with the pertinent provisions of regulation S-X where the security is a certificate of deposit, voting trust certificate or certificate or other evidence of interest in a similar trust or agreement, the 'total assets' of the issuer of the security held under the trust or agreement shall be deemed to be the 'total assets' of the issuer of such certificate or evidence of interest."

Also following the passage of the Act, form 16 for registration of voting trust certificates was provided for filing pursuant to Section 12 (b) and has remained in substantially the same form except for the fact that it has now been expanded to cover filings pursuant to Section 12 (g). For this form see paragraph 28802 of Volume 3 CCH Federal Securities Law Reporter page 21602 and the form actually filed by the trustees of the Provident Life Insurance Company voting trust in early 1971 after the failure to register had been drawn to their attention by the Securities and Exchange Commission, which registration statement is found at page 61-68 of R2.

These regulations were authorized by the statute. Registration was required. Because not registered before solicitation of

consents, there was a violation of the law. Regulation of securities is within the police power so no possible violation of the Tenth Amendment is involved.

The authority of the Commission to make such regulations appears to be clear. Since there was a violation of the statute and the regulations in failing to register and in failing to file the proxy material, the decision of the Court of Appeals appears to be correct and should be left standing in force and effect by denial of the petition for the writ of certiorari.

CONCLUSION

For the reasons stated herein, the petition for writ of certiorari should be denied.

Respectfully submitted,

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SUPREME COURT, U. S.

Supreme Court, U. S.
FILED

DEC 20 1974

MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-423

PROVIDENT LIFE INSURANCE COMPANY, R. W. EDICK, ET AL., AS TRUSTEES OF THE PROVIDENT LIFE INSURANCE COMPANY VOTING TRUST DATED NOVEMBER 15, 1955, AND EXTENDED TO NOVEMBER 14, 1980,

Petitioners,

vs.

RESERVE LIFE INSURANCE COMPANY AND MIDLAND NATIONAL LIFE INSURANCE COMPANY,

Respondents.

REPLY BRIEF OF PETITIONERS

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MAY IT PLEASE THE COURT:

I.

Respondents' supplemental statement of facts refers to a stipulation relating to the record on appeal (Opp. Br. p. 4). It was stipulated that Plaintiffs' Exhibit 32 (R. 2, p. 103) was a copy of the Rules and Regulations for the Solicitation of Proxies, Consents and Authorizations of Domestic Stock Insurers prescribed and promulgated by the North Dakota Director of Insurance.

Opp. Br. refers to Respondents' Brief.

R. 1 and R. 2 refer to Volumes 1 and 2, respectively, of the Appendix filed with the Court of Appeals and certified to this Court.

Pet. refers to Petitioners' Petition.

It was further stipulated that those regulations were in the standard form proposed by the National Association of Insurance Commissioners and were adopted to meet the requirements of Section 12 of the Securities Exchange Act of 1934 with respect to the exemption from registration claimed by the Petitioners (Pet. pp. 7, 18-21). Respondents omit reference to the last sentence of the stipulation: "If either party thinks any portion of the rules are applicable, the applicable portions will be set out in their briefs." None were set out or referred to in Respondents' Brief.

The other parts of the stipulation refer to the *contentions* of Respondents (R. 2, p. 103). The undisputed record is that the North Dakota Commissioner of Insurance concluded that the proxy regulations of his office did not apply to the solicitation of an extension of a voting trust; but that, in any event, the materials filed by Petitioners were in compliance with North Dakota proxy regulations (R. 45, Pet. p. 9).

II.

We find nothing in Respondents' Brief, nor in the cases cited (Opp. Br. 4-10), which militates against our plain and simple argument that the words "registered pursuant to Section 12" mean just what they say and that the decision of the Court of Appeals here is in direct conflict with the Second Circuit in *Republic Technology Fund, Inc.* v. *Lionel Corp.* (Pet. p. 14) and *Upson* v. *Otis* (Pet. p. 15) and the District Court of New Jersey in *Bound Brook Water Co.* v. *Jaffe* (Pet. pp. 14, 15), all three of which construed the word "registered" to *mean* "registered".

To say that there is no conflict between the Court of Appeals here and the Second Circuit because *Republic Technology* "was decided on facts that arose prior to 1964" (Opp. Br. p. 5) and that "there is some doubt about the holding of *Upson* . . ." (Opp. Br. 7, 8) and the SEC disagrees with it (Opp.

Br. 9) is, we submit, with all deference to opposing counsel, fatuous. For, what Respondents are really saying is that *Republic Technology* and *Upson* read "registered" to include "required to be registered",—a goal long sought by the SEC without success except in the Court of Appeals here.

We suggest that it is rather unseemly for the SEC in its *amicus* brief in the Court of Appeals to argue (Opp. Br. p. 10) that Section 14 of the 1934 Act should apply to securities "required to be registered," when the quoted language had repeatedly been denied legislative sanction and the SEC had deleted the language in a final draft it submitted for legislative approval (Pet. pp. 15, 16). Further, SEC Rule 12b-6 (17 CFR § 240.12b-6) provides that Section 14 of the 1934 Act does not become applicable until the securities are *registered* under Section 12.

III.

As to Respondents' II (Opp. Br. pp. 10, 11), our petition cites three cases from this Court clearly revealing that the Court of Appeals failed to construe the statutes at bar according to the hornbook rules of statutory construction laid down in those three cases, *Reliance Electric Company, Blau* and *American Fire and Casualty Co.* (Pet. p. 14).

IV.

As to Respondents' III, we question the practice, if not the propriety, of gratuitous statements of "information orally given by members of the staff of the Securities and Exchange Commission" relative to the comparative number of filings "involving voting trusts" and "other types of securities" and the "quick glance through . . . Best's life insurance reports", and what is "much more prevalent now," and the argument based upon these matters dehors the record (Opp. Br. p. 11).

V.

We see no occasion to reply to points IV and V of Respondents' Brief (Opp. Br. pp. 12-15).

VI.

Finally, we find nothing in Respondents' Brief answering our arguments that:

1. The Court below usurped jurisdiction in bringing within the Securities Exchange Act of 1934 matters in respect of insurance company securities *exempted* therefrom by Section 12(g)(2)(G) of said Act. (Pet. pp. 18-21);

2. The Court below invaded rights reserved to the States and thus violated the Tenth Amendment by holding that the solicitation of the extension of a Voting Trust Agreement involving the common stock of an insurance company by the trustees of said Trust Agreement came within the Securities Exchange Act of 1934 (Pet. pp. 21-24); and

3. The Court below has created a statutory inconsistency which has not been but should be settled by this Court in holding that the same transaction constituted both an offering and sale of a new security within the meaning of the 1933 Act and at the same time the solicitation of a proxy, consent or authorization within the meaning of Section 14(a) of the 1934 Act. The effect is that a transaction lawful under the 1933 Act is unlawful under the 1934 Act (Pet. pp. 25-28).

CONCLUSION

We again respectfully submit that the Petition for Writ of Certiorari be granted for the reasons stated therein.

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